(1)
Supreme Court, U.S.
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IN THE UNITED STATES SUPREME COURT
October term 1997

Lars W. Ehrlander,
Petitioner,

v.

The State of Alaska, D.O.T.; Mr. John Athens,
in his official and personal capacity
Respondents.

On Petition For Writ of Certiorari
to the Alaska Supreme Court

PETITION FOR WRIT OF CERTIORARI

LARS W. EHRLANDER, Pro Se
161 Palace Circle
Fairbanks, Alaska 99701
Telephone: (907) 451-8342

104 pp

1. Whether futile attempts to raise issues in a sister case trigger *res judicata* in an independent action, when the issues had been formally reserved for future litigation and the claims involves bifurcated issues, post trial issues, and fraud;

2. Whether a state supreme court, sua sponte, may take on the role of fact finder and jury;

3. Whether a state's providing due process and just compensation and adhering to state and federal condemnation laws is discretionary;

4. Whether a federal civil rights claim can be dismissed on time bar and immunity before the damage is known, when there has been ongoing litigation and continuous fraud and when the dismissal is based on erroneous interpretation of federal law;

5. Whether the State of Alaska or its officers may stipulate to bifurcate valuable federal property rights to a second trial, benefit from part performance, and breach the agreement when it was too late to appeal the first trial, resulting in the state's taking vested property rights absent due process or compensation;

6. Whether our federal constitutionally protected rights were violated when our family was singled out to pay a disproportionate share of this public project.

LIST OF PARTIES

Mr. Lars W. Ehrlander, pro se petitioner.

v.

The State of Alaska, Department of Transportation, and
Mr. John Athens, State Counsel, in personal and official capacity.

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04-30-96 Alaska Supreme Court denies raising issues in sister case

03-12-97 Alaska Supreme Court upholds the lower court

04-07-97 Alaska Supreme Court denies Petition for Rehearing

JURISDICTIONAL BASES FOR THIS COURT

1. The Final Order was entered on 3-4-96, the Alaska Supreme Court's Memorandum Opinion and Judgment upholding Judge Savell's 12-13-95 ruling.

2. This case is related to a case under appeal with the Ninth Circuit [F-021]. (Rule 11)

3. The Alaska Supreme Court denied rehearing on 4-7-97.

4. This Court has jurisdiction to review the judgment by the Alaska Supreme Court under USC., 28 Sec. 1254, 1257.

CONSTITUTIONAL PROVS.- STATUTES - REGULATIONS

US Constitution Article 4 Sec. 1, 2

Article 3 Sec. 2 Article 6.

Amdnt. 5, eminent domain.

Amdnt. 7, trial by jury.

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Amdnt. 13, involuntary servitude.

Amdnt 14, due process of law.

A.C. Sec. 6, petition.

A.C. Sec. 7, due process.

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A.C. Sec. 18, eminent domain.

Alaska Constitution Art. 1. Sec. 1.
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AS 09.10.070

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STATEMENT OF THE CASE

FACTUAL STATEMENT.

The trial court had found an early taking based on business interference. Because of a third party's involvement, the parties

stipulated to split the condemnation case. The first trial would only deal with the raw land. Decreases attributed to the highway project and business damages were bifurcated to a second trial [A.11, 41, 68]. The first trial was held establishing the impaired value of the raw land [A.68]. On the eve of the second trial commencement, the case was dismissed by a new judge, based on an alleged failure to appeal a borough platting board decision. The Alaska Supreme Court reversed. However, instead of remanding the case back to proceed with the interrupted second trial, the high court, *sua sponte*, took on the roll of the jury and made several factual findings, but without the benefit of knowing the facts [A.12].

The Supreme Court concluded that we must reestablish an inverse taking based on a test provided by the Court. If an early taking were found, our compensation would be limited to interest on the value [A.13]. We would not receive the actual value of the property on the date of taking. The Court simply ignored the bilateral agreement where the parties had stipulated to bifurcate several property rights to a second trial. The net result was that we were not compensated for $350,000.00 worth of fixed improvements that we had installed on the property, nor for the enhanced value attributed to the improvements. Nor did we receive compensation for decreases attributed to the highway project.

I submitted several motions for leave to raise the bifurcated issues [A.41, 68] in what was left of the second trial, but all attempts were denied by the Alaska Supreme Court without explanation [A.48].

The trial court recognized the injustice and invited us to amend our complaint to include the bifurcated issues. This effort was also reversed by the Supreme Court. The trial court eventually found a business interference taking, and we received interest as damages calculated on the value of raw land two years later, when it was severely impaired by the proposed highway project.

After several unsuccessful attempts to litigate the value of the fixed improvements and decreases caused by the highway project in state courts [A.48] I was prepared to initiate federal litigation. I learned through case law that I first had to raise the issues in the state court. Having been denied an opportunity to raise the issues in the sister cases, I initiated a new state case in the Savell Court in order to exhaust State remedies. By now additional post trial issues had emerged, such as the State's failure to build an access road on adjoining property and civil rights violations. These civil rights violations consisted mainly of the State's and its officers' engaging in a fraudulent agreement, stipulating to bifurcate valuable property rights to a second trial [A.41, 68], and breaching that agreement when it was too late to appeal the first trial. This has resulted in our not having been provided due process or just compensation for the State's taking our improvements.

The Savell Court dismissed all issues without even permitting discovery. It held that all taking issues were *res judicata* even though my claim involved bifurcated issues and post trial issues. The court

apparently viewed our several denied attempts to raise the issues in the sister case as our having had a fair opportunity to fully litigate the issues on their merits, even though there had never been a hearing on the issues. The court based its ruling on the erroneous assumption that the State's appraiser had appraised the property as "fully subdivided" in the sister case [A.11], he did not [A.45, 66]. The court dismissed our civil rights claims based on time bar and immunity, even though there had been continuous litigation on other legal theories, and *equitable estoppel* should therefore have applied. Further, our claim also exposed fraud which also should have tolled time. Most importantly, we did not know if we had been damaged until all appeals in the sister cases were decided. Regarding immunity, this Court has ruled that a state officer is not immune from violating civil rights under the color of state law. It is therefore a fact that federal law was not properly applied by the state courts [A.49-57].

This case also addresses abuse and violation of due process and just compensation. This case is to determine whether being denied leave to litigate issues in a sister case erroneously, without a hearing on the merits, trigger's *res judicata* in an independent action based on federal law. Further, this case is about whether *res judicata* can apply to bifurcated and post trial issues.

The Alaska Supreme Court has stated that the value was established by the jury in the first trial and therefore it is inappropriate

to reopen the issue of just compensation, and the issues are now *res judicata*. This position ignores the fact that the parties stipulated to litigate these property rights issues in a second trial [A.41]. It also ignores the fact that several issues are post trial issues.

The Supreme Court has also stated that we lost the right to future litigation because we did not appeal the first trial. Appealing the first trial should not be relevant to our post trial issues. This holding also ignores the bifurcation agreement [A.41]. We did not disagree with the jury from the first trial, that the property was impaired, and there was therefore no apparent reason to appeal. A second trial on the bifurcated issues was guaranteed by our agreement, court order, and by the Constitution.

RAISING THE FEDERAL QUESTIONS IN THE STATE COURTS, THE METHOD OF RAISING THEM, AND HOW THEY WERE PASSED ON BY THE COURTS

Besides raising the federal issues on several occasions in the sister cases and in several motions in this case, (1) we raised the federal issues in our 4-10-95 Complaint, (2) we raised the issues in our 12-26-65 Motion to Reconsider Dismissal, (3) we raised the issues in our 1-25-96 Points on Appeal.

The Savell Court dismissed all issues based on *res judicata*, immunity, or time bar.

The federal issues were raised in several motions to the Alaska Supreme Court during the case 2287 appeal. Our motions were all

denied without the Court's providing a reason. (1) The federal issues were raised in our 8-5-96 Brief of Appellant [case 4FA-95-870]. The federal issues were raised in our 3-21-97 Motion to Reconsider and for Rehearing. The motion was denied without the Court's providing a reason.

The Alaska Supreme Court has simply ignored the bifurcation agreement. It has held that just compensation was determined by the jury in the first trial, and because we did not appeal that verdict, we cannot receive compensation for the improvements, even though the issues were bifurcated from that trial.

ARGUMENT

Reasons for granting a Writ of Certiorari.

1. A state court of last resort has decided on an important federal question in a way that conflicts with the decision with another state court of last resort or of a United States court of appeals.

2. A state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

This case involves a state's, and its officers', blatantly violating federal civil rights by singling out our family to pay a disproportionate share of a public project, by fraudulently stipulating to bifurcate federal property rights to a second trial, benefiting from part performance, and

then breaching our bilateral contract when it was too late too appeal the first case and then denying our access to the courts on the bifurcated, and post trial issues because we did not appeal the first trial. The fact that this land scam was perpetrated by a government makes it worse, not better.

QUESTION 1. Whether futile attempts to raise issues in a sister case trigger *res judicata* in an independent action, when the issues had been formally preserved for future litigation and our claims involved post trial, bifurcated issues and fraud (and where the judge acted under conflict of interest).

The Due Process Clause guarantee "to all individuals [of] a meaningful opportunity to be heard. 401 US 379 ***Logan v. Zimmerman Brush Co*** 455 US 422 (1982), ***JB v. Washington County*** 905 F Supp 907 (D.Utah 1995), ***Sheerbonnet, Ltd. v. American Express Bank LTD*** 905 F Supp 127 (S.D.N.Y. 1995).

The Savell Court should not have denied discoveries. It should not have dismissed issues that the parties had stipulated to bifurcate to a second trial or post trial issues. Being denied an opportunity to raise the issues in a sister case does not make those issues *res judicata* in a new independent action nor does it satisfy the federal mandate of due process. *Res judicata* was never intended to permit a court to dismiss an independent action against fraudulent entry into a contract to bifurcate property rights to a future trial, followed by breach of that contract when it was too late to appeal the first trial. Nor is *res judicata* relevant to

the State's taking an access road on adjoining property several years later. Further, our civil rights claims should not have been dismissed on time bar and immunity. The federal issues had been formally preserved during previous litigation, without objection from the State [A.77]. There had been continuous litigation attempting to find relief through pursuit of other legal concepts and the damage, if any, had not yet been established. Dismissing on this ground was abuse of due process.

Judge Savell's dismissal was not based on established law. It is clear that Judge Savell had a conflict of interest, having represented my former partner on real estate matters at the time of our dissolving our partnership and Judge Savell's being a likely witness (my former partner now passed away). Further, Judge Savell dismissed the case shortly before he sought the governor's endorsement for appointment to the Alaska Supreme Court. Furthermore, the wife of the state officer charged in our complaint, is a colleague of Judge Savell (Judge Savell denied all discovery).

QUESTION 2. Whether a state supreme court, *sua sponte*, taking on the role of the fact-finder violates federal due process.

The Alaska Supreme Court's taking on the role of fact finder prevented our having an opportunity to explain evidence and develop a full factual record. The limited format of an appeal does not provide that process. We have the right to have a jury decide whether property rights were taken absent just compensation, or alternatively, whether the

State and its officers violated our civil rights. Whether there were business damages or decreases caused by the highway project are jury issues and not factual issues to be decided by the Alaska Supreme Court on appeal from summary judgment.

QUESTION 3. Whether a state's providing due process and just compensation and adhering to state and federal condemnation law is discretionary.

The Alaska Supreme Court appears to have made a game of how far they can abuse our civil rights. The Alaska Supreme Court has departed from all fundamental law. It has made such unorthodox rulings as denying the highest and best use, not appraising the property impaired, compensation for fixed improvements. The Court denied litigating bifurcated issues. The Court even denied my motion to adhere to statutory law. The Supreme Court reversed the lower court's finding of an inverse taking, it reversed the lower court's invitation to amend our complaint and to proceed on an alternate legal doctrine. It denied us litigation fees when we prevailed on appeal. It fined us $2,500.00 for attempting to reopen the first trial after it denied us the right to litigate the bifurcated issues in the second trial. It only permitted 75% litigation fees when we prevailed in what was left of the second trial, even though Rule 72 provides for 100%. It did not permit us to establish the value on the date of taking, and based the value on a single tract of unimproved land, two years later, impaired from the highway project and with inferior zoning, when it in fact took 4 fully improved city lots.

It permitted the State to default on the Bifurcation Agreement that was reduced to a court order. It denied our amending our Points on Appeal.

> The hearing required by the due process clause of the Fourteenth Amendment must be meaningful and appropriate. . . . It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard. ***Bell v. Burson*** 402 US 535 (1971). The constitutional requirement (of a hearing before deprivation of a property right) does not depend upon any narrow balancing process. ***Roberts v. New York*** 295 US 264 (1934), ***Board of Regents v. Roth*** 408 US 564 (1972).

The Fourteenth Amendment provisions are clear federal mandates not subject to sovereign immunity. Otherwise, the Fourteenth Amendment would have no meaning.

The Alaska Supreme Court's denying an opportunity to litigate the issue of compensation for the $350,000 worth of fixed improvements and the enhanced value attributed to those improvements, as well as from the property's having been subdivided city lots, is unprecedented and contrary to the law and to every other state or circuit court's ruling. Moreover, it is contrary to the rulings of this Court. Further, the State's failure to build the frontage road to which it committed in the taking documents, leaving some lots landlocked after the taking, was an additional compensable taking of property rights. ***State v. Glen*** 602, P2d 253 (Or. 1979), ***State v. Lewis*** 785 P2d 24 (AK 1990), ***Grant v. State of Alaska*** 560 P2d 36(AK 1977).

The Fifth Amendment provides for due process and just compensation. The standards set by this Court have been ignored by the Alaska Supreme Court. Taking property rights absent a hearing on the issues and not paying for fixed improvements does not reach that standard. The State can adopt its own Constitution and statutes, but they may not fall below the federal standards. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987), ***United States v. Virginia E.&P. Co.*** 365 US 624 (1961), ***Kirby Forest Industries, Inc. v. United States*** 467 US 1 (1984), ***United States v Twin City Power Co.*** 350 US 222 (1955), ***Parratt v. Taylor*** 451 US 524 (1981), ***Ruckelshous v. Monsanto Co.*** 467 US 986 (1984).

The Seventh Amendment provides for a jury's deciding factual issues. The Alaska Supreme Court did not have the right to deny a jury trial on all factual issues. ***Burlington Northern v Nebraska Public Power Dist.*** 931 F Supp 1470 (D.Neb. 1996), ***United States v Gaudin*** 132 L Ed 2d 444 (1995). For opposing view, ***Wilson v. Jones*** 902 F Supp 673 (E.D.Va 1995).

The Eighth Amendment provides for no excessive fines or cruel and unusual punishment. Taking vested property rights absent just compensation, destroying our business, singling out our family to pay a disproportionate share ($2 million) of a public project, and taking our property for less than our cost -- less than we owed the bank, making us subject to a judicial foreclosure, even though the relevant

issues had been preserved in a Bifurcation Order for litigation in a future trial, is an excessive fine and cruel and unusual punishment. (no rulings on the issue)

The Thirteenth Amendment provides for no involuntary servitude. We have never intentionally waived our rights to just compensation. Being singled out to pay a disproportionate share of a public project violates this Amendment. (no rulings on the issue)

The Fourteenth Amendment provides for due process of law when taking private property and for equal protection of the laws. The Alaska Supreme Court's taking on the role of fact finder, absent a hearing, violated this Amendment. Singling out our family to pay more than our fair share of the highway project violates this Amendment. ***Parratt v. Taylor*** 451 US 524 (1981), ***Logan v. Zimmerman Brush Co*** 455 US 422 (1982), ***Bell v. Burson*** 402 US 535 (1971), ***Roberts v. New York*** 295 US 264 (1934), ***Board of Regents v. Roth*** 408 US 564 (1972).

The Alaska Supreme Court must adhere to state <u>and federal laws</u>. In our case <u>all</u> condemnation laws were ignored:

1. <u>*The highest and best use*</u>. The Alaska Supreme Court's denial of compensation based on the highest and best use for which the property was suitable on the date of taking, contradicts the law of the land. Judge Blair and Judge Steinkruger both found the highest and best use to be as subdivided lots [48, 115(5)]. Yet, we were only compensated

for a single tract of unimproved raw land [p.99, 230]. ***Carl R. Lange v. State of Washington*** 547 P2d 282 (Wash. 1976).

2. *Fair market value on date of taking.* The Alaska Supreme Court's denial of compensation for the fair market value on the date the property was actually taken, before it became impaired by the pendency of the highway project, violates AS 34.60.120(3) and 49 CFR Sec. 24.103(b). It ignores those issues' having been preserved for future litigation in a partially implemented Bifurcation Agreement. This is contrary to the law of the land. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987), ***United States v. Twin City Power Co.*** 350 US 222 (1955).

> Just compensation, as required by the Fifth Amendment, means the value of what is taken at the very time it is taken and to the person from whom taken. ***Kirby Forest Industries, Inc. v. United States,*** 467 US 1 (1984).

3. *AS 34.60.120 (3) [p.217] or 49 CFR Sec. 24.103 (b)[p.220]*

Accordingly, the impact of that event upon the likelihood of actual exercise of the easement cannot be considered. As one writer has pointed out, "[i]t would be manifestly unjust to permit a public authority to depreciate property values by a threat ... [of the construction of a government project] and then to take advantage of this depression in the price which it must pay for the property" when eventually condemned. ***United States v Virginia E. & P. Co.*** 365 US 624 (1961).

The framers intended for decreases to be excluded, not disregarded as held by the Alaska Supreme Court.

5. *Damages* The Alaska Supreme Court erred in denying compensation for damages to our business that was located on the premises and to our investment backed housing project. The addition of the word "damaged" to our Constitution [p.212] made compensation for damages a federal vested property right. Nor should our business or our investment backed project have been taken absent just compensation. The stipulated agreement estops the State from now opposing damages and decreases. ***F.Giannini v. First National Bank of De Plains*** 483 NE 2d 924 (Ill. App. 1985).

> Pretrial stipulation has the effect of amending the complaint. ***Lake Havasu Com. Hosp v. Ariz Title Ins*** 687 P2d 371 (Ariz App 1984).
>
> Stipulation does not evaporate with new counsel. Stipulation will stand; when one reaped the benefits one cannot deny stipulation. ***Marden v. Intern. Ass'n of Machinist ETC.*** 576 F2d 576 (1978).
>
> [O]ral contract with respect to interest in land may become enforceable, in spite of statute of frauds, where there has been part performance. ***Pedring v. Chun*** 906 F.Supp. 1377 (D.Hawaii 1995).
>
> The "just compensation" provision in the Fifth Amendment is designed to bar government from forcing some people alone to bear a public burden which, in all fairness and justice, should be borne by the public as a whole. ***First Lutheran Church v. Los Angeles County*** 482 US 304 (1987).

QUESTION 4. **Whether a federal civil right claim can be dismissed on time bar and immunity, before**

the damage is known, when there has been ongoing litigation and fraud is an issue.

Permitting the State's entering into a Bifurcation Agreement to remove vested property rights from the first trial for future litigation and then to breach this bilateral contract after partial implementation is contrary to the law of the land. So is the State's and its officers' habitually misrepresenting to the courts what property rights were taken, enforcing an illegal department policy to take property for as little as possible, regardless of applicable laws. ***Ketron v. Chattanooga - Hamilton County Hosp.*** 919 F Supp 280 (E.D.Tenn. 1996), ***Hafer v. Melo*** 502 US 21 (1991), ***Stevens v. McHan*** 3 F3d 1204 (8th Cir. 1993), ***Valdez v City of New London*** 903 F Supp 286 (D.Conn. 1995), ***Pruneyard Shopping Center v. Robins*** 447 US 74 (1980), ***Roberts v. City of Forest Acres*** 902 F Supp 662 (D.S.C. 1995), ***Sanfilippo v. County of Santa Cruz*** 415 F.Supp 1340 (N.D.Cal. 1976).

> . . . whether breach affects interest sufficiently grave to trigger due process scrutiny; court must look to effect of breach on claimant and determine whether effect is so dramatic and rights implicated so fundamental that Constitution provides remedy. ***Irwin v. City of New York*** 902 F Supp 442 (S.D.N.Y. 1995).
>
> Taking -- Result. It does not matter how it was done, technical label, it is the result that matters. ***Hughes v. Washington*** 389 US 290, 298 (1967)
> Insofar as 42 USCS Sec. 1983 affords a civil remedy for deprivations of federally protected rights by persons acting under color of state law without any express requirement of a particular state of mind, the initial inquiry in any Sec. 1983 action must focus on whether

> two essential elements to a Sec. 1983 action are present, that is, whether the conduct complained of was committed by a person acting under color of state law, and whether this conduct deprived the person of rights, privileges, or immunities secured by the Constitution or laws of the United States. ***Parratt v. Taylor*** 451 US 524 (1981).

Equitable Estopple tolled time. There is no immunity from violating constitutional rights under the color of state law. We should at the very least have been accorded a hearing on whether these constitutional violations existed. These are fundamental federal rights that must be enforced.

While there is no set formula for determining when justice and fairness require that economic injuries caused by a public action must be deemed a compensable taking, and the inquiry into whether a taking has occurred is essentially an ad hoc, factual inquiry; several factors should be taken into account when determining whether a governmental action has gone beyond regulation and effects a taking, among which are the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. ***Ruckelshaus v. Monsanto Co.*** 467 US 986 (1984), ***Howard v. Grinage*** 82 F3d 1343 (6th Cir. 1996), ***State v. Waggoner*** 319 S.W.2d 930 (Mis. 1959), ***City of Los Angeles v. Decker*** 558 P2d 545 (Cal. 1977).

QUESTION 5. The Bifurcation Agreement.

The State and its officers should not have engaged in this fraudulent agreement in order to avoid paying for the improvements we had done to the area. This was a bilatteral contract where the state had benefited from partial performance by keeping valuable property rights out of the first trial. We have a vested federal right in this agreement. It is such basic law that I will not add case law citations.

QUESTION 6. Paying a disproportionate burden.

Singling out our family to subsidize this highway project with our working capital and savings by paying less than our cost for the property and less than what we owed to the bank, making our family subject to a judicial foreclosure, making us substantially poorer, violated the Alaska Constitution that provides for damage compensation. A Constitutional violation is self-executing. [W]here a plaintiff's claim had been dismissed for failure to comply with a trial court's order -- the Court read the "property" component of the Fifth Amendment's Due Process Clause to impose "constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause." ***Parratt v. Taylor*** 451 US 524 (1981), ***Carter v. Carter Coal Co.*** 298 US 342 (1935), ***First Ev. Chur. Glendale v. LA*** 482 US 304

(1987), ***Defeo v. Sill*** 810 F Supp 648 (ED. PA. 1993), ***Irwin v. City of New York*** 922 F Supp 442 (S.D.N.Y. 1955).

CONCLUSION

The main question is whether the state can ignore all laws in order to get a bargain on land.

DATED this 5th day of May, 1997 at Fairbanks, Alaska.

By: _____

Lars W. Ehrlander, *pro se*

DIRECTORY OF APPENDICES

Opinions, Orders, Findings of Facts and Conclusion of Law:

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OPINIONS, ORDERS, FINDINGS OF FACTS AND CONCLUSIONS OF LAW

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT
LARS W. EHRLANDER, Plaintiff,
v.
STATE OF ALASKA DOT; MR. JOHN ATHENS, in his official and personal capacity, Defendant (s).
Case 4FA-95-870 Civil

ORDER GRANTING INJUNCTIVE RELIEF

Pursuant to AS 09.25.110, AS 09.25.120, AS 09.25.124 this Court, being fully informed of the premises, makes the following ruling. IT IS HEREBY ADJUDGED, ORDERED, AND DECREED THAT:

Plaintiff, Lars W. Ehrlander, Pro Se, is entitled to examine the public record at the Attorney General's Office, relating to the taking of his property.

ENTERED this 2nd day of June, 1995, at Fairbanks, Alaska

DENIED. Plaintiff must utilize Civil Rule 34 and specify the records which he seeks to discover. Discovery in this case must proceed under the rules of discovery. R. D. Savell 6/19/95

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

LARS W. EHRLANDER, Plaintiff,
v.
STATE OF ALASKA DOT; MR. JOHN ATHENS, in his official and personal capacity, Defendant (s).
Case 4FA-95-870 Civil

ORDER STAYING DISCOVERY PENDING THE COURT'S RULING ON THE MOTION FOR SUMMARY JUDGMENT

Good cause appearing.

IT IS HEREBY ORDERED that all discovery in this case is stayed until the court's ruling on the pending motion for summary judgment.

IT IS FURTHER ORDERED that a hearing to create a discovery plan is to be set at a trial date setting conference.

DATED: 8/3/95 R. D. Savell, Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars W. Ehrlander, Plaintiff,

v.

State of Alaska Department of Transportation; Mr. John Athens in his official and personal capacity. Defendants.

Case No. 4FA-95-0870 Civil

Judge Richard D. Savell, Superior Court Judge

DEC 13,1995

MEMORANDUM DECISION

Before the Court is a motion for summary judgment filed by defendants State of Alaska, Department of Transportation (DOT}, and John Athens (Athens), in his professional and personal capacity (collectively, the State), and a cross-motion for summary judgment filed by plaintiff Lars Ehrlander (Ehrlander). In his complaint, Ehrlander raises the following claims: 1} the State effected an unconstitutional taking of his property without just compensation in Case No. 4FA-86-886CI, a formal condemnation action, and Case No. 4FA-86-2287CI, an inverse condemnation action; 2} the State violated his state and federal constitutional rights; and 3) the State committed the common law torts of "malfeasance, malice, and misrepresentation" in its handling of the condemnation and valuation of his property. The State asserts that these claims are alternatively barred based on immunity, statute of limitations or *res judicata.* Although Ehrlander's motion is denominated as a cross motion for summary judgment, he also requests relief in the form of a new trial on the issue of damages and

enforcement of a stipulation agreement between the parties to bifurcate the prior condemnation and inverse condemnation actions.

FACTUAL AND PROCEDURAL BACKGROUND

The dispute between the parties spans more than a decade, stemming initially from the State's condemnation of a portion of Ehrlander's property which lay in the path of the Geist Road Extension project. Since Ehrlander's acquisition of the property, extensive litigation has ensued. Throughout the course of the previous litigation, Ehrlander was represented by attorneys Robert John and William Satterberg. DOT was represented in part by Athens, Assistant Attorney General.[1] In the present lawsuit, Ehrlander is a pro □ litigant. The facts leading up to the current and previous litigation between the parties can be summarized as follows:[2]

Ehrlander, a real estate developer, purchased a 24 acre parcel of

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1. Athens represented the State on both the formal condemnation case and the inverse condemnation case in 1986 and early 1987. In 1987, both Ehrlander cases were referred to Gary Vancil (Vancil). Vancil, as private counsel, represented the State through trial on the condemnation case and through the first merit appeal on the inverse condemnation case.

2. The factual background is developed in greater detail in *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990) and in Judge Steinkruger's Findings of Fact and Conclusions of Law in *Ehrlander v. State*, Case No. 4FA-86-2287CI.

essentially unimproved property in Fairbanks in 1983. At the time of his purchase, Ehrlander was aware that a portion of the property lay within the proposed path of the Geist Road Extension project contemplated by DOT. Despite this potential interference, Ehrlander believed he could subdivide the entire property.

On July 21, 1983, Ehrlander paid $1,000 in earnest money toward the property. On August 9, 1983, Ehrlander Closed the purchase of the property using $1.2 million in short-term financing. Subsequently Ehrlander awarded contracts to install roads, a sewer system, a water distribution system, and other infrastructure on the property. Further, Ehrlander sought to have the entire property annexed to the City of Fairbanks, and secured a 5500,000 performance bond for the city to insure that the improvements would be completed. Ehrlander employed Ellerbe Alaska, Inc., to prepare a plat for the subdivision to be known as Royal Court Village.

Shortly thereafter, Ehrlander submitted a subdivision request to the Borough. Ehrlander had previously contacted DOT directly and was told that DOT's long term plans for the Geist Road Extension were not likely to interfere with Ehrlander's subdivision plans. During the time that Ehrlander was seeking approval of his subdivision plans, the Borough was in regular contact with DOT concerning the proposed path of the road extension. DOT had not

yet established the precise placement of the road. In August 1983, without notifying Ehrlander, DOT submitted an amended proposal to the Borough in which three of the four proposed road locations traversed the southern portion of Ehrlander's property. Ehrlander continued with his efforts to subdivide the property. In September 1983, the City of Fairbanks (City) approved the Royal Court subdivision, under an agreement that Ehrlander would receive City utilities upon improvement of the property to the City's standards. Subsequent to the City's approval, a number of problems developed with the Borough Platting Board (Board) concerning the subdivision plans. Several hearings before the Board ensued. Relying on DOT's representations that the likely path of the Geist Road Extension would traverse Ehrlander's property, the Board approved Ehrlander's subdivision request in part, but denied it with respect to the area encompassing the potential route of the extension, roughly the southern two-thirds of the property. This area is reflected as Sections A and B on the attached appendix.

DOT had indicated that the actual location of the road extension would be determined by field survey, but would lay no further north than the red line noted on Ehrlander's plat. This line is approximately reflected on the appendix as the line between Section A and Section B. Accordingly, the Board approved phased development of

the property, with Sections A and B of property remaining unimproved pending DOT's decision as to exact location of the road.

Ehrlander proceeded to market the lots in the northern portion of his property, known as Royal Court village. At this time, Ehrlander remained hopeful that his subdivision plans for Section A might be approved in the event that DOT chose a more southern route for the Geist Road Extension. Ehrlander subsequently sought reconsideration of the Board's partial denial his subdivision plat. Aside from the approval of two additional lots for development, the Board affirmed its August 24, 1983 decision.

Following the Board's partial denial of Ehrlander's subdivision plat, DOT proceeded with public hearings as to the precise location of the Geist Road Extension. The only potential route not passing through Ehrlander's property would traverse the property of Monroe High School. The public strongly resisted this option in favor of the route passing through Ehrlander's property.

In December 1983, the Borough and the State formally chose the designated route for the Geist Road Extension as the one passing through Ehrlander's property. The State indicated to Ehrlander its intent to formally initiate acquisition procedures against that portion of Ehrlander's property located to the south of the red line on the plat, i.e., Section B on the appendix.

In early 1984, Ehrlander began to prepare a second subdivision proposal. With the aid of Karen Tilton of Ellerbe Alaska, Ehrlander prepared an initial plat for a second subdivision, to be known as Royal Court Village, First Addition. The subdivision was to be located in Section A, on that portion of his property to which the Board had denied subdivision at the hearings in August and September 1983. This parcel lay to the north of the route designated for the Geist Road Extension. Tilton spoke extensively with DOT to ensure that the design of the second subdivision plat would not conflict with the plans for the road construction. Ehrlander received final plat approval from the Board for this subdivision in March 1985.

The Geist Road Extension, as constructed in 1990, substantially corresponds with the location agreed upon by Tilton and DOT. Ehrlander incurred additional expenses in replatting and redesigning the Royal Court Village, First Addition portion of the subdivision.

On April 29, 1986, the State filed the Notice of Taking as to that portion of Ehrlander's property located south of the Royal Court Village, First Addition, depicted as Section B on the appendix. The condemned property was divided into four tax lots at the time of the taking and amounted to slightly over 6 acres. Prior to issuance of the Notice of Taking, the State sought to appraise Ehrlander's property and the parties entered into negotiations to determine the value of the land

taken and the related expenses incurred by Ehrlander. On December 3, 1987, the State's appraiser, Gary Hoagland (Hoagland) determined the value of condemned property to be $4.50 per square foot. Hoagland his appraisal on the assumption that the property was fully subdivided. When no agreement resulted, the State instituted a Condemnation action in court.

On April 29, 1986, the State initiated condemnation proceedings, in Case No. 4FA-86-886CI, with respect to the southern portion of Ehrlander's property, Section B on the attached appendix. In turn, Ehrlander filed an inverse condemnation action against the Fairbanks North Star Borough (the Borough) and DOT in Case No. 4FA-86-2287CI. The two actions were initially consolidated by Judge Blair. Subsequently, by stipulation, the condemnation action was severed from the inverse condemnation claim, with the condemnation action to be tried first. The bifurcation order, dated November 20, 1987, specified that the issues to be determined in the inverse condemnation action were "damages and compensation due Ehrlander for that period of time from August 24., 1983 until April 29, 1986."

At the condemnation trial, a jury awarded Ehrlander damages in the amount of $1.79 per square foot, a total of $524,000, for the condemned property, in addition to severance

damages of $147,870. This award mirrored the amount sought by the State. Ehrlander had argued that the property was between $4.50 and $4.95 per square foot, approximately the value set by the State's appraiser. Ehrlander did not appeal this verdict. Subsequently Ehrlander settled his inverse condemnation case claim with the Borough, leaving DOT as the only remaining defendant.

Judge Steinkruger, who was assigned to the remaining inverse condemnation action following Judge Blair's retirement from the bench, granted summary judgment in favor of DOT and consequently - dismissed all of Ehrlander's claims. Judge Steinkruger's ruling was based on Ehrlander's failure to exhaust his administrative remedies. Ehrlander appealed.

In his appeal he claimed that the court erred in dismissing his complaint for failure to exhaust administrative remedies because his claims were not based on the action of the platting board. He also argued that DOT unreasonably delayed in bringing the condemnation proceedings and that such delay amounted to an imputed taking. Alternatively, he argued that even if there were no imputed taking, DOT acted unreasonably prior to instituting the condemnation action, causing a decline in the value of his property.

On appeal, the supreme court reversed the trial court's grant of summary judgment and remanded the case to determine whether an

imputed taking of Ehrlander's property had occurred under *Lange v. State*, 547 P.2d 282 (Wash. 1976).[3] *Ehrlander v. State*, 797 P.2d 629 (Alaska 1990). The Ehrlander court stated:

> In the event that an inverse condemnation is found, interest should run from the date of inverse condemnation until April 29, 1986. Whether interest should be calculated on the award already made by the jury in the condemnation trial or whether a new value should be determined for the purpose of calculating interest is a question which has not been briefed and we express no opinion on it.

Id. at 636.[4]

On remand, the trial court concluded that an imputed taking had occurred as of September 14, 1984, and that Ehrlander was

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[3] In order to determine this, the Court must examine what has come to be known as the Lange factors:

> For the time of valuation to be advanced, [1) marketability must be substantially impaired and [2] The condemning authority must have evidenced an unequivocal intention to take the specific parcel of land. [3] The special use of the land by the owner must be acquiring and holding the property for subsequent development and sale. [4] Further, the owner must have taken active steps to accomplish this purpose.

Ehrlander at 634, citing *Lange v. State*, 86 Wash.2d 585, 547 P.2d 282 (1976).

[4] In its Memorandum in Support of Summary Judgment, the State maintains that the supreme court "affirmed the [superior court's] dismissal of the inverse condemnation claim." This statement is misleading. While the supreme court affirmed the lower court's ruling that DOT could not be held responsible for damages stemming from the Borough's denial of Ehrlander's subdivision plat, the opinion expressly left open the issue of whether an inverse condemnation occurred.

entitled to be compensated from that date to April 26, 1986 the date from which the jury awarded damages in the condemnation case. The court left the parties to brief the issue of measures of damages. The parties disputed whether the supreme court's opinion in *Ehrlander* proscribed a new measure of damages or merely allowed for an advancement of the date of taking for purposes of calculation of interest.

In an order dated July 24, 1991, on consideration of a petition for review, the supreme court clarified its previous opinion in Ehrlander:

> Just compensation has been established in this case by the verdict of the jury. . . . The issue on retrial should be whether there was an inverse condemnation. If condemnation is found, Ehrlander is entitled to interest, but not damages, from the date of the inverse condemnation until April 29, I986. As expressed in our prior opinion, it is an open question whether a new value should be determined for the purpose of calculating interest.

In December 1992, the court trial was held on the remanded *Lange* claim to determine if the date of taking should be advanced. On Oetober 20, 1993, judgment was entered on the *Lange* claim awarding Ehrlander $114,420 in interest, plus prejudgment interest, costs, and attorney fees.

Ehrlander next filed a Rule 60(b) motion seeking reconsideration, which the court denied. In Memorandum Opinion and Judgment No. 0731, issued on July 6, 1994, the supreme court

affirmed the trial court's denial of the Rule 60(b) motion. Ehrlander and the State have appealed the superior court's judgment on the *Lange* claim. These appeals, S-6075 and S-6076, are now pending. In the pending appeals before the Alaska Supreme Court, in addition to many other assertions, Ehrlander also maintains his claims of fraud, misrepresentation, newly discovered evidence, and breach of fiduciary duty.

Ehrlander, acting as a pro se plaintiff, now brings a variety of claims against both the State and Athens, in his professional and personal capacity. These claims are exclusively based upon conduct which allegedly occurred in the course of the prior litigation.

In sum, Ehrlander claims that: 1) the State has yet-to fairly compensate him for the taking of his property; 2) he was prohibited from presenting evidence at trial regarding the value of his property and lost profits; 3) the State, Athens, and others conspired to defraud the court; 4} Athens has committed malpractice and should be disbarred; 5) the State breached a stipulation agreement; and 6) the State and its representatives acted in bad faith and in violation of fiduciary duties with respect to the condemnation and valuation of Ehrlander's property. The parties have each moved for summary judgment. *Ehrlander v. State of Alaska, et al.* 4FA-95-0870 Civil.

THE STATE' S MOTION

The State has moved for summary judgment asking that all claims against it be dismissed with prejudice. The State raises the following arguments in support of its motion: 1) the State cannot be sued for federal constitutional civil rights claims; 2) Athens is immune from all federal constitutional claims against him in his personal capacity; 3) the state constitution bars this suit for damages; 4) common law tort claims against the State and Athens are barred by both a lack of duty and immunity; 5) all tort claims arising before April 10, 1993, are barred by the statute of limitations; and 6) all remaining claims are barred by *res judicata*. Ehrlander filed a lengthy opposition to the State's summary judgment motion and cross-moved for summary judgment. He subsequently filed a pleading entitled "Amended Statement of Genuine Issues" which lists what he claims to be thirty-nine genuine issues of material fact precluding summary judgment. This list essentially repeats his arguments outlined in his complaint and Memorandum in Opposition to Defendant's Motion for Summary Judgment and Cross Motion for Summary Judgment.

Ehrlander summarizes his "Whole Memorandum in One Sentence:"

> Based on the premise that the State is not immune from paying Just Compensation for property it takes, nor from providing Due Process, and that there is no tolling of time in a Constitutional taking

> case, or at least time does not begin until injury is known, and since the parties have stipulated on bifurcating these issues to a second trial, and these issues have not been heard by any finder of facts, and the State committed fraud, I filed this case to have the Bifurcation Order, Stipulating Agreement enforced, to receive business damages, to have the property appraised according to law, and to establish if my property that was taken on April 29, 1986 was impaired by the highway project, and if it was appraised in its impaired state by the State of Alaska, in violation of A5.34.60.120(3), and if there were compensable damages.

In addition to the claims in his above-stated summary, Ehrlander also raises claims of ineffective assistance of counsel, newly discovered evidence, breach of fiduciary obligations, and a "thief theory."

DISCUSSION

Summary judgment is appropriate only where the pleadings, depositions, answers to interrogatories, admissions, and affidavits show that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *Thorstnenson v. ARCO Alaska, Inc.*, 780 P.2d 371, 374 (Alaska 1989) ; Alaska R. Civ. Proc. 56 (c). In making this determination the Court must view the facts in the light most favorable to the nonmoving party. *Gudenau & Co. Inc. v. Sweenev Insurance, Inc.*, 736 P.2d 763, 7B5 (Alaska 1987); *Estate of Arrowwood v. State*, 894 P.2d 642, 644 n.2 (Alaska 1995).

The Condemnation/Inverse Condemnation Claims Are barred By Res Judicata.

Ehrlander claims that the State failed to adequately compensate him for the losses he incurred as a result of the State's condemnation of his property. Specifically, Ehrlander maintains that his property should have been appraised as subdivided, improved city lots and that the State wrongfully based its valuation on values associated with large tracts of unimproved land. Further, Ehrlander maintains that the State violated the terms of the bifurcation agreement by not awarding him the damages he alleged. He requests a new trial on the issue of the measure of his damages.

The State does not address the merits of these claims, but instead argues that they are precluded by *res judicata*, based on the judgments rendered in the prior condemnation and inverse condemnation actions. The State asserts that any claims not so precluded are barred by the statues of limitation or immunity.

Ehrlander's main contention throughout his voluminous pleadings is that the State and Athens took his property without "just compensation." However, this Court need not address the merits of these claims since they are barred by the doctrine of *res judicata*. Under the doctrine of res judicata, a final judgment bars a subsequent suit, between the same parties or their privies, upon the same claim or demand. *Jackinsky v. Jackinsky*, 894 P.2d 650, 654 (Alaska 1995); *Tolstrup v. Miller*, 726 P.3d 1304, 1306 (Alaska 1986). A final

judgment extinguishes all claims "with respect to all or any part of the transaction, or series of connected transactions" out of which the previous action arose. Restatement (Second) of Judgments §24 (1982). Further, res judicata "precludes relitigation by the same parties, not only of claims raised in the first proceeding, but also those relevant claims that could have been raised." *Martech Construction Company, Inc. v. Ogden Environmental Services, Inc.*, 852 P.2d 1146, 1152, n. 13 (Alaska 1993); *Tolstrup v. Miller*, 726 P.2d 1304, 1306 (Alaska 1986).

In order to promote judicial economy and consistency of judgments, res judicata bars a party from using a new theory to relitigate a matter that has already been fully litigated. An issue has been fully litigated when it has been effectively raised, "either in the pleadings or through development of the evidence argued at trial or on motion." *Murray v. Feight*, 741 P.2d 1148, 1153-54 (Alaska 1987). A final judgment extinguishes all claims "with respect to all or any part of the transaction, or series of connected transactions" out of which the previous action arose. *Tolstrup*, 726 P.2d at 1306, quoting Restatement (Second) of Judgments §24 (1982). *Res judicata* does not act as a bar when the conduct giving rise to the later suit postdates the conclusion of the first suit. *Jackinsky*, 894 P.2d at 656. In addition, *res judicata* does not bar a suit if the party did not have opportunity to litigate the matter at issue in the earlier suit. Ehrlander apparently argues that

because he did not receive the measure of damages he sought, this issue was not fully litigated. He misapprehends the doctrine of *res judicata*. Each of the elements is present with respect to Ehrlander's current condemnation/inverse condemnation claims: 1) in Case No. 4FA-86-2287, the previous inverse condemnation action, the Alaska Supreme Court ruled that Ehrlander had received "just compensation" at the condemnation trial and was accordingly only entitled to interest from the date of the taking; 2) that case, as this one, involved the issue of compensation for the State's imputed taking of Ehrlander's property prior to issuance of the Notice of Taking; and 3) both Ehrlander and the State were parties to that action. Neither Ehrlander's dissatisfaction with the outcome of the prior litigation; nor his wholehearted belief that both the superior court and supreme court erred, will remove his current claims from the confines of *res judicata*.

Ehrlander argues that because "[n]one of the issues that [he] raise[s] have been heard by any Court," *res judicata* is inapplicable. While Ehrlander never succeeded in recovering business damages, or *Klopping* [5] damages in the prior litigation, it was not for lack of an opportunity to raise the issue. On at least four occasions, Ehrlander argued for the recovery of *Klopping* damages: I) before the supreme

[5] Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972).

court in Ehrlander, P.2d at 633, on appeal from the superior court's grant of summary judgment in favor of the State; 2) in his motion for clarification of the supreme court's decision in Ehrlander; 3) in his Rule 60(b) motion following the superior court's judgment in the verse condemnation trial; and 4) in his appeal from the superior court's judgment in the inverse condemnation trial, which is now pending before the supreme court.

Ehrlander's claims that he has not been fairly compensated for the imputed taking of his property have been fully litigated and decided in the prior litigation. Ehrlander is precluded by *res judicata* from relitigating these claims as a pro se plaintiff, regardless of his dissatisfaction with the outcome of the prior actions. No material factual issues exist with respect to these claims and the State is entitled to judgment as a matter of law. Summary judgment should be granted in favor of the State as to these claims.

Tort Claims of Fraud and Misrepresentation

Ehrlander makes several allegations that the State, Athens, and others conspired to commit fraud upon the court conspiring to take his property for as little as possible, misrepresenting the value of his property to the court, using deceptive language and incorrect facts to mislead the court.

The tort of intentional misrepresentation, as recognized under Alaska law, consists of the following elements: a false representation of fact, scienter, intention to induce reliance, justifiable reliance, and damage's. *Barber v. National Bank of Alaska*, 815 P.2d 857, 862 (Alaska 1991) ; Restatement (Second) of Torts §525 (1976). Negligent misrepresentation requires a similar showing, absent the scienter element, where there exists a duty "to exercise reasonable care or competence in obtaining or communicating the information." *Bubbel v. Wien Air Alaska, Inc.*, 682 P.2d 374, 380 (Alaska 1984); Restatement (Second) of Torts Sec. 552 (1976).

Ehrlander realizes that no action for misrepresentation can lie against the state,[6] but alleges numerous fraudulent activities and misrepresentations by Athens in his personal capacity. However, many of his accusations of fraud are against acts allegedly committed by Mr. Vancil,[7] who is not a party to this litigation. These cannot be used against Athens. In addition, most of Ehrlander's tort claims against Athens are based on his disagreement with Athens' interpretations of the law. Apparently Ehrlander believes that taking a contrary legal position on a matter is fraudulent.

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6. AS 09.50.250 expressly bars all claims against the State for misrepresentation.

Most of the statements cited by Ehrlander for support his fraud claim against Athens are legal arguments which Mr. Athens made to the court in the prior litigation. For example, Ehrlander takes issue with Athens' argument at the summary judgment hearing before Judge Blair that "the Ventures in Property case" was distinguishable from the Ehrlander condemnation, and his legal interpretation of AS 34.60.120(3). While Ehrlander obviously disagrees with opposing counsel's interpretations, Athens' legal arguments do not amount to fraud. And, to the extent they are incorrect and are relied upon by the Court, Ehrlander's avenue for redress is to appeal.

In addition to reference to a variety of other legal arguments made by Athens in the course of the prior litigation, Ehrlander claims that Athens made at least one factual misrepresentation to the court. Ehrlander asserts that the July 2, 1991, affidavit of Michael Tinker (Tinker), prepared by Athens, contained an erroneous date concerning a public hearing. Tinker affied that a public hearing on the issue of DOT's plan change was held on January 26, 1983, when in fact the

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7. Mr. Vancil was a contract attorney hired by the State to take over the case. Because Ehrlander has stated that he does not intend to raise a tort claim against the State, and because Vancil, in his individual capacity, is not a named party in this action, Ehrlander's allegations concerning Vancil's conduct are not considered in the discussion of his fraud claims.

hearing was held on that date in 1984. Ehrlander argues that this date was intentionally misstated in order to mislead the court as to the date of the imputed taking in the prior inverse condemnation action.

The State disputes this allegation, asserting that the affidavit referred to a different hearing than the one referenced by Ehrlander-and that no misrepresentation occurred. The State argues that Ehrlander's assertions, if believed, fail to establish the justifiable reliance element necessary to support a misrepresentation claim.

The State asserts that in the adversarial setting of litigation, the representations of opposing counsel cannot be said to induce reasonable reliance. while this argument is persuasive with respect to counsel's good faith legal arguments in cases where the applicable law is open to interpretation, the same cannot be said for counsel's factual representations made in the course of litigation. Given counsel's ethical duty of candor toward the court under Professional Conduct Rule 3.3, it is not only justifiable but integral to our legal system for litigants to rely upon the factual statements of opposing counsel.

The prosecution of Ehrlander's inverse condemnation claim led to a final judgment from which he has appealed to the Alaska Supreme Court. Inter alia, he has raised the issue of fraud on appeal. These facts do not prevent the operation of res judicata. *Calhoun v. State, Dept. of Transp.*, 857 P.2d 1191, 1195 (Alaska 1993) (the

superior court correctly held that *res judicata* barred Calhoun's fraud/misrepresentation claims). His relief has been sought in that case.

Even if this Court construes Ehrlander's pleadings as requesting relief from judgment under Civil Rule 60(b) in the form of an independent action,[8] the motion must have been brought within a reasonable time. The one year time limitation does not apply to proceedings to correct orders obtained by fraud upon the court. *Mallonee v. Grow*, 502 P.2d 432, 437 (Alaska 1972).

Under Civil Rule 60(b), to constitute "fraud upon the court," intent to defraud is not a necessary element and may be found even where representations are made with a good faith belief in their truth. *Allen v. Bussell*, 558 P.2d 496, 500 (Alaska 1976). However, the conduct must be so egregious that it involves a corruption of the

8. Rule 60(b) contains the following provisions:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal rep representative from a final judgment, order, or proceeding for the following reasons:
> (3) fraud (whether heretofore denominated intrinsic or, extrinsic), misrepresentation, or other misconduct of an adverse party; . . .
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the date of notice of the judgment or order as defined in Civil Rule 58.1(c). . . . This rule does not limit the power of the court to entertain an independent action to relieve s party from a judgment, order or proceeding, . . . or to set aside a judgment for fraud upon the court. . . . The procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

judicial process. Village of *Chefornak v. Hooper* Bay Construction, Co., 758 P.2d 1266, 1271 (Alaska 1988). [9]

In order to justify setting aside a judgment under Rule 60(b), the nature of the alleged fraud must have been sufficient to affect the result of the trial. *See McCall v. Coats*, 777 P.2d 655, 657-658 (Alaska 1989). Ehrlander has not demonstrated how the error in the Tinker affidavit would alter the outcome of his prior litigation if he were permitted to maintain an independent action for fraud. Further, an independent action to obtain relief from judgment is a most unusual remedy, and historically available only where there was extrinsic, as opposed to intrinsic fraud. *Stone v. Stone*, 647 P.2d 582, 586 n. 7 (Alaska 1982) (fraud alleged by wife could have been anticipated in original proceeding).

Athens' factual misrepresentations, if any, but not his prior good-faith legal arguments, might be considered in support of Ehrlander's fraud claim. With respect to the only alleged factual misrepresentation made by Athens, i.e., the Tinker affidavit, a material factual issue arguably exists as to whether this statement induced

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9. The courts have refused to invoke this concept in cases in which the wrong, if wrong there was, was only between the parties in the case and involved no direct assault an the integrity of the judicial process. Nondisclosure by a party or his attorney has not been enough. *Livingston v. Livingston*, 572 P.2d 79, 82 (Alaska 1977).

reliance and whether it resulted in legal damages. If the discrepancy in the date of a meeting would be material to the outcome, Ehrlander's remedy is to apply for Rule 60(b) relief in the court which rendered the judgment rather than filing an independent action. The original trial court is in a better position to determine whether the alleged fraud affected the outcome of this case.

The State also argues that, to the extent that Ehrlander's assertions, if believed, would be sufficient to withstand summary judgment on the fraud claims against Athens, the claims are nonetheless barred by the doctrine of sovereign immunity and the applicable statute of limitations. These defenses must be examined.

Statutory Immunity

The State asserts that Ehrlander's claims of fraud against Athens are barred on the basis of sovereign immunity. 09.50.250(3) expressly bars claims of misrepresentation against the State. The doctrine of sovereign immunity, delineated in this statute, applies to employees of the state, as the state may only act through its employees. Ehrlander does not dispute that Athens is a state employee for purposes of AS 09.50.250. Instead he argues alternatively that Athens has waived his immunity based on his fraudulent statements and that he is estopped from raising any defenses against Ehrlander's claims. Ehrlander apparently argues that because Athens acted beyond the

scope of his employment as counsel for DOT, the statutory immunity does not apply to him. Ehrlander has failed to establish that Athens engaged in misconduct which would constitute activity beyond the scope of his professional duty, and thus fall outside the purview of the statutory immunity. Ehrlander's misrepresentation claim is barred based on statutory sovereign immunity.

Statute of Limitations

The State also asserts that Ehrlander's misrepresentation claim is time barred. AS 09.10.070 provides that all tort actions must be commenced within two years after the cause of action has accrued. *Silverton v. Marler*, 389 P.2d 3, 4 (Alaska 1964). Similarly, claims for fraud and misrepresentation sound in tort and are subject to a two year statute of limitations. *Bauman v. Day*, 892 P.2d 817, 825 (Alaska 1995). Since Ehrlander filed his current complaint on April 10, 1995, all torts that were alleged to have been committed before April 10, 1993, would be barred by the two year statute of limitations.

Ehrlander does not allege that any of his claims arose subsequent to April 10, 1993. However, Ehrlander asserts that the two year statute of limitations was tolled with respect to his tort claims until he recently discovered evidence.

A cause of action in tort accrues, for purposes of the statute of limitations, when the wronged party knew or had reason to know of his or her injury. Under the current facts, there can be no doubt that Ehrlander knew of the Tinker affidavit at the time it was filed or shortly thereafter. This factual misrepresentation allegedly made by Athens occurred on July 2, 1991. Ehrlander filed the current action in 1,995, well after the running of the two year statute of limitations. Accordingly, Ehrlander's tort claim is time barred.

Although factual issues arguably exist with respect to Ehrlander's fraud claims against Athens, these claims are nonetheless barred by statutory immunity and the statute of limitations and summary judgment should be granted in favor of the State.

The Constitutional Claims Ehrlander raises a variety of state and federal constitutional claims against the State and Athens in his individual capacity. Specifically Ehrlander claims that the State violated his rights to due process and just compensation. The State asserts that it cannot properly be sued for either federal or state constitutional claims.

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10. In sum, Ehrlander asserts that since the withdrawal of his counsel, he has personally reviewed the pleadings and applicable law and determined that the previous judgments were entered in error. Because Ehrlander only recently read all of the court documents, he asserts that this newly discovered evidence gives rise to his claim.

1. Claims Against The State

The State argues that it cannot be sued for federal constitutional violations. While federal constitutional tort actions are authorized under 42 U.S.C 1983,[11] the State is not a "person" for purposes of section 1983 liability. Will v. Michigan Dept. of State Police, 491 U.S. 58, 65 (1989).

Further, with respect to the state constitutional claims, neither the Alaska Supreme Court nor the Alaska Legislature has recognized or created a damages remedy for state constitutional violations. *Vest v. Schafer*, 757 P.2d 588, 598-99 (Alaska 1988). See also, *State v. Enserch Alaska Const., Inc.*, 787 P.2d 624, 635 (Alaska 1989). Ehrlander does not offer authority to the contrary. Instead he asserts that it is "high time" the courts recognize state constitutional actions against the State. Ehrlander's personal opinions concerning the status of the law are insufficient to support his claim. His state and federal constitutional claims against the State must fail.

11. 42 U.S.C sec. 1983 (1981) reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Ehrlander raises a claim against Athens individually for civil rights violations under 42 U.S.C. §I983. Specifically, Ehrlander asserts that Athens wrongfully effected a taking of his property without just compensation or due process in violation of the federal constitution. The State counters that this claim is barred by absolute quasi-prosecutorial immunity and qualified good faith immunity.

The United States Supreme Court has held that "where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Mitchell v. Forsyth*, 472 U.S. 51.1, 525 (1985)(quoting *Harlow v. Fitzgerald*, 457 U.S. 808, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982)).

The doctrine of qualified immunity bars a section 1983 claim against a public employee unless a clearly established federal right is shown to have been violated. *Mitchell v. Forsyth*, 472 U.S. 51I, 526 (1985). In order to defeat a qualified immunity defense, a plaintiff must make a twofold showing:

> first, that a defendant's conduct violated federal law; and, second, that such law was clearly established when the alleged violation occurred. [citation omitted] In order to satisfy this burden, a plaintiff must do more than identify in the abstract a clearly established right and allege that a defendant has violated it. "The 'contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violated that right.'"

Spielman v. Hildebrand, 873 F.2d 1377, 1383 (IOth Cir. 1989) (citations omitted). Ehrlander has failed to present cognizable evidence of any clearly established federal rights violations.

In his complaint, Ehrlander alleges that Athens violated his rights to just compensation and due process. In support of these constitutional claims, Ehrlander essentially repeats his condemnation/inverse condemnation arguments, asserting that Athens failed to fairly compensate him for the taking of his property. As discussed above, these claims have been fully litigated and decided, are accordingly barred by *res judicata*. Further, in light of the Alaska Supreme Court's prior finding that Ehrlander was fairly compensated for the State's taking of his property, Ehrlander's assertions that Athens violated his just compensation and due process rights are unsupported.

Inadequate Representation

Ehrlander argues that he is entitled to a new trial because he was inadequately represented by his attorney:

> When represented by an attorney, he is in full charge of the litigation, and rightly so, he is the expert in a very complicated process. My attorney as well as both the lower and higher courts were adversely effected by the States instructions, as the ultimate authority on how to appraise property for condemnation, on how to deal with this case. we all relied on the state's instructions and should have the right to do so. My attorney also belonged to the good old boys club, and would not inform the Courts

> on known misconduct by his fellow college [sic]. . . . On several occasions, I asked my attorney why he did not respond to the State's unethical conduct, his reply was that he was not interested in getting involved in mud slinging or that sort of irresponsible litigation. He insisted on litigating the case on the facts and he was naive enough to believe that his word would carry equal weight to that of the State's attorneys. . . .

Although Ehrlander may possibly have a claim against his former attorney for malpractice, "ineffective assistance of counsel" is not a ground for setting aside a civil judgment. *Nelson v. Jones*, 781 P.2d 964, 968 n.3 (Alaska 1989).[12]

Breach of Fiduciary obligations

Ehrlander argues that the State has a fiduciary obligation to be fair and ensure just compensation. Ehrlander cites to no authority which states that the State owes a fiduciary duty to adverse parties, and no case law exists which supports this position and authorizes an independent action for damages.

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12. In addition, Ehrlander is chargeable with any negligence an the part of his attorney for statute of limitations purposes.

> Insofar as "constructive notice" and "diligent investigation" affect the computation of the limitations period, the plaintiff is generally charged with the lapses of attorneys acting in his behalf.

Pedersen v. Zielski, 822 P.2d 903, 907 n. 5 (Alaska 1991) (quoting *Gutierrez v. Mofid*, 39 Cal.3d 892, 218 Cal.Rptr. 313, 318, 705 P.2d 886, 891 (1985)).

Based upon the above quotation, Ehrlander's "discovery rule" argument discussed above, must also fail.

Ehrlander's "Thief Theory"

In addition to the fraud claims against the State and Athens, another theory that Ehrlander raises which was not raised during previous proceedings[13] is "The Harassment Immunity Evil Fraud Theory (Thief Theory)" which appears to be a theory created by Ehrlander:

> The State now adopted a new theory for condemning private land in Alaska. It is known as the THIEF Theory where they take and damage private property without compensation [sic] the owner. It is strictly based on their alleged immunity as opposed to the merits of the case. There is actually some legal Support for the THIEF Theory, but it is often followed by a revolution. . . .

In support of this undefined theory, Ehrlander cite: to Alaska *DOT v. Ehrlander*, 792 P.2d 629 (Alaska 1986). [14] He states that this is the only case he could find supporting the THIEF theory, but he knows there are more.

CONCLUSION

Ehrlander's condemnation/inverse condemnation claims merely restate the legal and factual issues fully decided in the prior litigation. These claims are barred by *res judicata*. The fraud claims against Athens

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13. The fraud claims, as well as all of Ehrlander's other claims, are now pending in two appeals before the Alaska Supreme Court in S-6075 and S-6076.

14. Presumably Ehrlander is referring to Ehrlander v. State Dept. of Transp., 797 P.2d 629 (Alaska 1990).

are barred by both statutory immunity and statute of limitations. Finally, the constitutional claims are barred based on *res judicata* and immunity. Summary judgment is GRANTED in favor of the State as to all claims against it.

DATED at Fairbanks, Alaska, this 13 day of December, 1995.

Richard D. Savell, Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

LARS W. EHRLANDER, Plaintiff,
v.
STATE OF ALASKA DOT; MR. JOHN ATHENS, in his official and personal capacity, Defendant (s).
Case 4FA-95-870 Civil

ORDER

IT IS ORDERED that plaintiff's motion for reconsideration is DENIED.

DATED at Fairbanks, Alaska, this 18 day of January, 1996
Richard D. Savell, Superior Court Judge

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

LARS W. EHRLANDER, Plaintiff,
v.
STATE OF ALASKA DOT; MR. JOHN ATHENS, in his official and personal capacity, Defendant (s).
Case 4FA-95-870 Civil

ORDER

IT IS ORDERED that Plaintiff may add parties to the suit as requested.

DENIED 1/18/96 Judge R. Savell

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

LARS W. EHRLANDER, Plaintiff,
v.
STATE OF ALASKA DOT; MR. JOHN ATHENS, in his official and personal capacity, Defendant (s).

Case 4FA-95-870 Civil

FINAL JUDGMENT

This cause having come before the court on motion of Defendants State of ?Alaska Department of Transportation and John Athens for entry of final judgment and the court having granted such motion,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that. the complaint against Defendants is DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED that Plaintiff pay a total of $2,533.82 to Defendants for attorneys fees. Costs are waived by Defendants.

DATED: 3-4-96 RICHARD D. SAVELL

SUPERIOR COURT JUDGE

THE SUPREME COURT OF THE STATE OF ALASKA

LARS EHRLANDER,
Appellant,

v.

STATE OF ALASKA, DEPARTMENT OF TRANSPORTATION; MR. JOHN ATHENS, in his official and personal capacity,
Appellees

Supreme Court No. S-7535
Superior Court No. 4FA-95-0870 Civil

MEMORANDUM OPINION AND JUDGMENT

[No. 848 - March 12, 1997]

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Richard D. Savell, Judge.

Appearances: Lars W. Ehrlander, pro se, Fairbanks. Raymond M. Funk, Assistant Attorney General, Fairbanks, Bruce M. Botelho, Attorney General, Juneau, for Appellees.

Before: Compton, Chief Justice, Rabinowitz, Matthews, Eastaugh, and Fabe, Justices.

The judgment is affirmed for the reasons stated in the memorandum decision of the superior court dated December 13, 1995.

We independently address appellants claim that Judge Savell should have recused himself from this case, because this claim is not discussed in the memorandum decision. Appellant did not include this issue in his statement of points on appeal. Leave to amend the points was denied. However, because we can address the issue effectively without reference to untranscribed portions of the electronic record, we will decide it. Alaska R. App. P.204 (e).

Appellant's complete argument on this point is as follows:

JUDGE SAVELL SHOULD HAVE RECUSED HIMSELF (CANON 2,3)

Judge Savell represented my partner at a time of turmoil. He should clearly have

> recused himself from the case or at least disclosed his conflict of interest. He should not have disposed of bifurcated or post litigation issues on res judicata and having done it with prejudge suggests his bias. JB v. Washington County 905 F. Supp [979] (D. Utah 1995).

This argument is unconvincing. The fact that Judge Savell, before he was appointed to the bench, represented appellant's partner during a time of turmoil is not, without more, a ground for disqualification. See Code of Judicial Conduct, Canon 3(C); AS 22.20.020(a).

Reference to the record indicates that Judge Savell represented James Lundgren., appellants former partner, in an unrelated condemnation action which was concluded in 1986. Appellant stated in his motion for relief from judgment: "It is highly unlikely that Judge Savell was not aware of my relationship with Mr. Lundqren and our problems even if he only worked on another condemnation action. It is unlikely that Judge Savell did not advise Mr. Lundgren also in our dispute." No evidentiary basis supports this speculation. Here, as in Long v. Long, 816 P.2d 145, 156 (Alaska 1991), appellant's argument that a judge should have been disqualified is "conjectural and unconvincing" and " [a] review of the record as a whole fails to reveal any unfairness in the conduct of the [proceedings] and the alleged instances of bias, considered either collectively or

individually, fail to demonstrate any specific bias or generalized pattern of bias." Id. (quoting Alaska Trams Corp. v. Alaska Elec. Light & Power, 743 P.2d 350, 353 (Alaska 1987), cert. denied, 485 U.S. 905 (1988)) (alteration in original).

Appellant also appeals the superior court's award of attorney's fees to the State. A trial court's award of attorney's fees pursuant to Alaska Rule of Civil Procedure 82 will not be overturned unless it can be shown that the "court abused its discretion by issuing a decision which is arbitrary, capricious, manifestly unreasonable," or that the award "stems from an improper motive." Tobeluk v. Lind, 589 P.2d 873, 878 (Alaska 1979).

The trial court awarded the State $2,533.62 in attorney's fees under Civil Rule 82. This award is exactly twenty percent of the total of $12,668.10 in attorney's fees incurred by the State in defending against appellant's claims. Appellant first argues that the award is not proper because there was no money judgment in the case. Civil Rule 82(b)(2) provides for an award of attorney's fees in cases where there has been no money judgment. Appellant next argues that the superior court should only have awarded the State ten percent of its total fees. Again, Civil Rule 82(b) calls for an award of twenty percent of the total fees incurred in cases like this one where there was no money judgment and the case did not go to trial. Finally, appellant argues that the trial court

lacked jurisdiction to enter an award of attorney's fees after he filed a notice of appeal. Alaska Rule of Appellate Procedure 204(a)(5)[b) provides that "the pendency of an appeal shall not divest the trial court of jurisdiction to consider the matters of costs and attorney's fees pursuant to Civil Rules 79 and 82."

Civil Rule 82 provides that the party prevailing in an action shall receive twenty percent of its reasonable actual attorney's fees, necessarily incurred, when a case does not go to trial and there is no money judgment. The trial court in this case followed the Rule 82 formula to the letter and, absent a claim that the State's attorney's fees were unreasonable or were not necessarily incurred, could not have abused its discretion in doing so.

AFFIRMED.

* Entered pursuant to Appellate Rule 214

ORDER REGARDING FEES AND COSTS

Ehrlander v State, DOT
File No. S-7535

Under Appellate Rules 508(e) and (f)(1), attorney's fees of $1000 are awarded to the appellee. On or before MARCH 24,1997, the appellee shall serve and file with this court an itemized and verified bill of costs.

Entered at the direction of an individual justice on March 12,1997.

CLERK OF THE SUPREME COURT
C. Vance
Deputy Clerk

cc: Authoring Justice
Trial Court Appeals Clerk Fairbanks

In the Supreme Court of the State of Alaska

Lars W. Ehrlander,		
Appellant,	)	Supreme Court No. S-07535
v.	)	
State of Alaska, Dep't of	)	**Order**
Transportation,	)	Petition for Rehearing
Appellee.	)	Date of Order: 4/7/97

Trial Court Case # 4FA-95-00870CI

Before: Compton, Chief Justice, Matthews, Eastaugh, and Fabe, Justices, and Rabinowitz, Justice Pro Tem* [Bryner, Justice, not participating].

On consideration of the Petition for Rehearing filed on 3/24/97,

IT IS ORDERED:

The Petition for Rehearing is **DENIED**.

Entered by direction of the court.

Clerk of the Appellate Courts
Jan Hansen

*Sitting by assignment made under article IV, section 16 of the Alaska Constitution.

cc: Supreme Court Justices
Judge Savell
Trial Court Clerk/FBX

Distribution:

Raymond M. Funk
Attorney General's Office
100 Cushman Street, Suite 400
Fairbanks AK 99701

Lars Ehrlander
161 Palace Circle
Fairbanks AK 99701

OPINIONS, ORDERS, FINDINGS OF FACT AND CONCLUSIONS OF LAW IN COMPANION CASES

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander, plaintiff,

vs.

Fairbanks North Star Borough and State of Alaska, Department of Transportation and Public Facilities, defendants.
Case No: 4FA-86-2287 Civil

and

State of Alaska, plaintiff,

vs.

6.313 acres, more or less, Lars W. Ehrlander, et al, defendants.
Case No. 4FA-86-886
Project No. RS-RRS-M-OOOS(52)
Parcel No. 2OA

Date of Order: November 20, 1987

ORDER

The Court, being fully advised in the premises, and upon stipulation of the parties,

IT IS HEREBY ADJUDGED, ORDERED, AND DECREED that the above-captioned case shall be bifurcated, with the condemnation case, pertaining to the summons and complaint filed on April 29, 1986, being tried during the week of December 7, 1987, and under the appropriate provisions of the existing pretrial order.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that the inverse condemnation taking case, with respect to the complaint filed by Lars Ehrlander, shall be reassigned for a trial date subsequent to the condemnation case, and that the issues to be determined in that case shall be the damages and compensation due Ehrlander for that period of time from August 24, 1983 until April 29, 1986, and that the parties shall apply to the court for a new trial date with respect to that inverse condemnation case.

Date: Nov. 20, 1987 Signed, James R. Blair, Superior Court Judge.

Case No. 4FA-86-2287 & 4FA-86-886 Civil.

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

State of Alaska, plaintiff,
vs.
6.313 acres, more or less, Lars W. Ehrlander, et al, defendants.
Case No. 4FA-86-886

December 7, 1987 TRIAL on 1986 value. (impaired and absent improvements)
Judge Blair, superior court judge

Mr. Vancil, counsel for the State
Mr. Satterberg, counsel for defendant.
(Mary Ehrlander Direct) *From 1987 trial transcript page 220:*

MR. VANCIL: Your Honor, then could I ask for the most explicit ruling you can give about the degree to which anything relating to the '83 to '85 temporary taking should be excluded, for instance . . .

THE COURT: All I can . . .

MR. VANCIL: . . . any reference to plat . . .

THE COURT: All I can tell you is if the plat's in existence in 1983 and the values are based upon that, then I can't see that there's going to be much of a later trial unless Mr. Ehrlander can show that he could have sold property for much more between 1983 and 1986 . . .

MR. SATTERBERG: Our primary . . .

THE COURT: . . . than he could at the time of the taking. On the other hand if the testimony is, from the appraisers, that had there been a

plat in 1983 then the property of 1986 would be X, but since there wasn't a plat in 1983, then the value is Y. Then you got an XY theory for the later trial. But you're still going to be able to -- if the testimony at this trial goes -- which I would think you'd both want to do frankly as far as determining this trial -- if the testimony goes we're going to give you a 1986 valuation, assuming that there was a plat was in existence in 1983, then that resolves all the major issues except whether you could have gotten more money between '83 and '86.

. . .

MR. VANCIL: Well, Your Honor, I'm saying that as I understood your order, you were not going to allow us to talk about damages resulting from the 1983 to '85 taking and . . .

THE COURT: That's right and I'm not.

MR. VANCIL: . . . and those damages are presumed not to have occurred in this appraisal, so that if . . .

. . .

THE COURT: If Karl Sopp comes in and testifies that the property is worth "X" in 1985, $1,500,000.00 -- or '86, $1,5000,000.00 and that's based upon the fact it should have been zoned or platted in 1983 and Mr. Vancil (sic) walks away with a $1,500,000.00 verdict, that ends any discussion as far as additional damages except the ones that I've already indicated exist.

MR. SATTERBERG: Sure.

THE COURT: From '83 to '86, that is possible sales that could have taken place before '86 that would have been more and possible carrying charges or things of that nature the he's talked about.

MR. VANCIL: My problem, Your Honor, is that the appraisers have different assumptions. The State appraisers do not assume anything other than we have an '86 taking of unimproved property. The consequence of that difference is large.

. . .

THE COURT: The highest and best use was a subdivision in 1986 and the Borough should have granted a plat to allow that to be used as a subdivision in 1986, which I guess everybody agrees they should have done. . . .

.THE SUPERIOR COURT FOR THE STATE OF ALASKA

Case: 4FA-86-2287 CI
December 1992
Judge Niesje J. Steinkruger, Superior Court Judge.

Mr. John Athens State attorney.
Mr. Robert John, attorney for plaintiff.

TRIAL ON A "*LANGE* TAKING"

Transcript page 666

MR. ATHENS: But you can collect, I would say.

THE COURT: Under?

MR. ATHENS: Under the -- well Mr. Ehrlander, in the Supreme Court, tried to argue the *Klopping* theory. Now I think there are other theories that he can collect on, but the Supreme Court has said those other theories have been waived. So, yeah, I would agree with the Court that if there is unrea . . .

THE COURT: And it's -- your position is the Supreme Court has said they've been waived because they weren't raised in the condemnation?

MR. ATHENS: Well they were waived -- the Supreme Court said they were waived because they weren't raised in the appeal, and the Court remanded only for the *Lange*, but .

THE COURT: And if I remember correctly, I ruled different than that, and that's when the Supreme Court came out with it's order and said they're waived.

MR. ATHENS: And the Supreme Court -- yes, only *Lange*.

THE COURT: So if the Court found, based upon what you're saying, if the Court found in this case that there was no unequivocal taking, but made findings that the period of time from the State's making its intent clear, say the publicized hearing for purposes of my question, until filing the application of taking, was reasonable and the landowner suffers damages during that time period by being unable to

develop his land, your position is there is no provision in this providing those damages to the landowner.

MR. ATHENS: That's right. That's already been ruled on by the Supreme Court.

THE COURT: Because they didn't present that theory on appeal.

MR. ATHENS: That's right..

Continuing on page 668:

THE COURT: Right, but let's assume -- you're going beyond the premise of my question. My premise of the question is, if the court finds evidence does support the four *Lange* propositions, then there is no inverse condemnation period.

MR. JOHN: I would say that there could be an inverse condemnation magnitude.

THE COURT: I don't have that anywhere. What I have is the Supreme Court saying, to find inverse condemnation, you must find the following four factors. And so my question, which I think I've figured out here, is if you don't find those factors, but you find an unreasonable delay, can damages be provided to the landowner? Mr. Athens' position is no, because the Supreme Court denied -- I mean the Supreme Court and I may disagree about this, but the Supreme Court has made it clear to me that I may not use the *Klopping* theory.

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.
Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
4-30-96 ORDER

DENIED: Motion to amend points on appeal -- motion to merge and stay, and oppositions -- motion to waive final judgment in the 886 case, to merge (2287 & 886) -- motion to enforce AS 34,60,120 (3) -- motion for judgment on *Klopping* damages -- motion for compensation for the improvements -- motion to enforce the Bifurcation Agreement -- motion for the highest and best use.

THE SUPREME COURT OF THE STATE OF ALASKA

State of Alaska, Department of Transportation and Public Facilities, Appellant and Cross Appellee,

v.

Lars Ehrlander, Appellee and Cross Appellant.
Superior Court No. 4FA-86-2287
Supreme Court No. S-6075/6076/7135
7-16-96 ORDER

DENIES motion to amend points on appeal and motion for relief from judgment. (On Judge Savell's conflict of interest)

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

Alaska Const. Art. 1. Sec. 1. Inherent rights. . . .all persons have natural rights to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry; that all persons are equal and entitled to equal rights, opportunities, and protection under the law...

A.C. Section 6., Petition. The right of the people to petition the government shall never be abridged.

A.C. Section 7. Due Process. No person shall be deprived of life, liberty, or property, without due process of law. The right of all persons to fair and just treatment in the course of legislative and executive investigations shall not be infringed.

A.C. Section 14. Searches and seizures. The right of the people to be secure in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures shall not be violated.

A.C. Section 16. Civil Suits: Trial by jury. In civil cases where the amount in controversy exceeds two hundred and fifty dollars, the right to trial by a jury of twelve is preserved to the same extent as it existed at common law...

A.C. Sec. 18 Eminent domain. Private property shall not be taken or damaged for public use without just compensation.

US Constitution Article 3, Section 2. The judicial power shall extend to all cases. No State may infringe on rights protected by the US Constitution.

Article 4 Sec. 1, 2. Citizens of each State shall be treated equally.

Article 6. This Constitution, and the Laws of the United States which shall be made under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

Amendment 1. Congress shall make no law ... abridging ... the right of the people .. to petition the Government for a redress of grievances.

Amendment 5. Due process; eminent domain. ... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 7. In suits at the common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

Amendment 8. ... nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment 11. The judicial power of the united States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any foreign State.

Amendment 13. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Amendment 14. Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

AS 09.10.070 Establishing Equitable Estoppel. Reliance on misrepresentations result in a party's failing to pursue a remedy timely.

Equitable Tolling. There is no need to pursue two similar remedies at the same time.

AS 09.25.010 Statute of Frauds (a) In the following cases and under the following conditions an agreement, promise, or undertaking is unenforceable unless it or some note or memorandum of it is in writing and subscribed by the party charged or an agent of that party...

AS 09.25.020 Exemptions to statute of frauds. A contract, promise, or agreement which is subject to AS 09.25.010, which does not satisfy the requirements of that section, but which is otherwise valid is enforceable if

(1) there has been full performance on one side accepted by the other in accordance with the contract; or

(2) there is a memorandum which would satisfy the requirements of AS 09.25.010 except for error or omission in the recital of past events; or

(3) there is a memorandum which would satisfy the requirements of AS 09.25.010 except for error or omission which could be corrected by reformation if it occurred in a formal contract; or (4) the party against whom enforcement is sought admits, voluntarily or involuntarily, in pleadings or at any other stage of this or any other action or proceeding the making of an agreement;

AS 09.45.630 Actions for recovery of real property. A person who has a legal estate in real property and has a present right to the possession of the property may bring an action to recover the possession of the property with damages for withholding it.

AS 09.55.310 (1), (2) Hearing.

(1) the value of the property sought to be condemned, and all improvements on it pertaining to the realty, and of each separate estate or interest in it; if it consists of different parcels, the value of parcel and each estate or interest in each parcel shall be separately assessed.

(2) if the property sought t[illegible]condemned constitutes only a part of a larger parcel, the damages w[illegible] will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned, and the construction of the improvements in the manner proposed by the plaintiff...

AS 09.55.320 Right to a jury trial as to damages and value of property. An interested party may appeal the master's award of damages and valuation of the property, in which case there shall be a trial by a jury on the question of the amount of damages and the value of the property, unless the jury is waived by the consent of all parties to the appeal.

AS 09.55.330 Compensation and Damages. For the purpose of assessing compensation and damages, the right to them accrues at the date of issuance of the summons, and its actual value at that date is the measure of compensation of the property to be actually taken, and the bases of damages to property not actually taken but injuriously affected in the case where the damages are allowed....

AS 09.55.370 Final order of condemnation. When payments have been made and the... the court shall make a final order of condemnation...

AS 09.55.430 Content of Declaration of Taking. (3) A description of the property sufficient for the identification of it;

AS 09.55.460 (b) Effect of appeal. The plaintiff may not be divested of a title or possession acquired except where the Court finds that the property was not taken by necessity for a public use or purpose in a manner compatible with the greatest public good and the least private injury. In the event of that finding, the court shall enter the judgment necessary to (1) compensate the persons entitled to it for a period during which the property was in the possession of the plaintiff... restore the property to the condition in which it existed at the time of the filing of the declaration of taking unless such restoration is impossible, in which case the court shall award damages to the proper persons as compensation for any diminution in value of the property caused by the plaintiff's wrongful possession.

AS 24.40.010 Invalidity generally. A conveyance or assignment, in writing or otherwise, of an estate or interest in lands, or in goods, or things in action, or of rents or profits issuing from them or a charge upon land, goods, or things in action, or upon the rents or profits from them, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages forfeitures, debts, or demands, or bond, or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded is void.

AS 34.40.090 Fraudulent intent question of fact. The question of fraudulent intent in a case arising under the provisions of this chapter is a question of fact, and not of law.

AS 34.55.004 Fraudulent and prohibited practices. It is unlawful for a person, in connection with the offer, sale or purchase of subdivided land directly or indirectly, to knowingly

(1) employ a device, scheme, or artifice to defraud;

(2) make an untrue statement of a material fact or omit a statement of a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or

(3) engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon a person.

AS 34.55.046 Definitions. (7) "subdivision" and "subdivided land" means land that is divided or is proposed to be divided for the purpose of disposition into two or more lots, parcels units, or interests and also includes any land whether contiguous or not if two or more lots, parcels units, or interests are offered as a part of a common promotional plan of advertising and sale; if the land is contiguous or is known, designated, or advertised as a common unit or by a common name, the land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for disposition as part of a common promotional plan.

AS 34.60.040 Relocation payments.

(1) actual expenses in moving a person, the person's family, business ...

(2) actual direct losses of tangible personal property as a result of moving or discontinuing a business...

(3) actual reasonable expenses in searching for a replacement business. (c) A displaced person eligible for payment under (a) of this section who is displaced from a place of business ... and who elects to accept the payment authorized by this subsection in place of the payment authorized by (a) of this section, may receive a fixed payment amount equal to the average annual net earnings of the business ... except that this payment shall not be less than $1,000.00 or more than $20,000.00.. 10

AS 34.60.070 Expenses incidental to transfer of property. ... The State agency... shall reimburse the owner, to the extent the department considers fair and reasonable, for expenses necessarily incurred for

(1) recording fees, transfer taxes, and similar expenses incidental to conveying the real property to the state agency;... AS 34.60.080. Litigation expenses. (a) (c) ... agency ... shall award ... a sum that will in the opinion of the court reimburse the owner for reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, actually incurred because of the condemnation proceeding.

AS 34.60.090 Relocation services. (4) assist a person displaced from the person's business or farm operation in obtaining and becoming established in a suitable replacement location;...

AS 34.60.120(3) Do not consider Decreases caused by the project. "A decrease in the value of property caused by the public improvement for which the property is acquired or by the likelihood that the property

would be acquired for the improvement must be disregarded in determining just compensation."

(9) If the acquisition of only part of the property would leave its owner with an uneconomic remnant, an offer to acquire the entire property shall be made.

AS 34.60.130. Uniform acquisition policy for improvements. ... if a state agency acquires any interest in real property, the state agency must acquire at least an equal interest in all buildings, structures or other improvements located upon the real property which the state agency requires to be removed from the real property or which the state agency determines will be adversely affected by the use to which the real property will be put.

(b) For the purpose of determining just compensation to be paid for a building, structure, or other improvement required to be acquired under (a) of this section, the building , structure, or other improvement is considered to be a part of the real property to be acquired. ... and the fair market value which the building, structure, or improvement contributes to the fair market value of the real property to be acquired...

AS 34.60.150 Definitions. (1) "business" means any lawful activity...

AS 44.88.38 Personal liability. An officer, employee, or agent of the authority may not be held personally liable in a civil action for damages for an act done or omitted in good faith while performing the functions of office, employment, or agency under this chapter.

USCS 23 Sec. 127 (b) -- *Reasonable access.* No State may enact or enforce any law denying reasonable access to motor vehicles subject to this title to and from the Interstate

USC 28 Sec. 1991, 1992, 1995

USC 42 Sec. 1455(c)(1)

USC 42 Sec. 4625

USC 42 sec. 1983 Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or

other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

USC 42 Sec. 1985 (2) ...if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any matter, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, ...

USC 42 Sec. 1986 Action for neglect to prevent.

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . . . but no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

FEDERAL REGULATIONS

49 CFR Sec. 24.101 -- Real Property Acquisition

Sec. 24.101 Applicability of acquisition requirements.

(a) *General.* The requirements of this subpart apply to any acquisition of real property for a Federal program or project, and to programs and projects where there is Federal financial assistance in any part of project cost except for: . . . .

49 CFR Sec. 24.102 -- Basic acquisition policies

(k) *Uneconomic remnant.* If the acquisition of only a portion of a property would leave the owner with an uneconomic remnant, the Agency shall offer to acquire the uneconomic remnant along with the portion of the property needed for the project. (See Sec. 24.2 (w).)

(l) *Inverse condemnation.* If the Agency intends to acquire any interest in real property by exercise of eminent domain, it shall institute formal condemnation proceedings an not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property.

49 CFR Sec. 24.103 -- Criteria for appraisals

(a)(2) An adequate description of the property being appraised (and, in the case of a partial acquisition, an adequate description of the remaining property), a statement of the known and observed encumbrances, if any, title information, location, zoning, present use, an analysis of highest and best use, and at least a 5-year sales history of the property.

(3) All relevant and reliable approaches to value consistent with commonly accepted professional appraisal practices. When sufficient market sales data are available to reliable support the fair market value for the specific appraisal problem encountered, the agency, at its discretion, may require only the market approach. if more than one approach is utilized, there shall be an analysis and reconciliation of approaches to value that are sufficient to support the appraiser's opinion of value.

(5) (b) Influence of the project on just compensation. To the extent permitted by applicable law, the appraiser shall disregard any decrease or increase in the fair market value of the real property caused by the project for which the property is to be acquired, or by the likelihood that the property would be acquired for the project, other than due to physical deterioration within the reasonable control of the owner.

(e) *Conflict of interest.* No appraiser or review appraiser shall have any interest, direct or indirect, in the real property being appraised for the Agency that would in any way conflict with the preparation or review of the appraisal. Compensation for making an appraisal shall not be based on the amount of the valuation. . . . .

49 CFR Sec. 24.304 -- *Reestablishment expenses -- nonresidential moves*

In addition to the payments available under Sec. 24.303 of this subpart, a small business, as defined in Sec. 24.2(t), farm or nonprofit organization may be eligible to receive a payment, not to exceed $10,000, for expenses actually incurred in relocating and reestablishing such small business, farm or non profit organization at a replacement site.

49 CFR Sec. 24.306 -- Fixed payments for moving expenses -- nonresidential moves.

(a) *Business.* A displaced business way be eligible to choose a fixed payment in lieu of the payments for actual moving and related expenses and actual reasonable reestablishment expenses provided by Sub Sec. 24.303 and 24.304. Such fixed payment, except for payment to a nonprofit organization, shall equal the average annual net earnings of

the business, as computed in accordance with paragraph (e) of this section, but not less than $1,000 nor more than $20,000. . . .

RULES

Rule 72 (3)-- **Dismissal of Action**. *By order of the court.* Any time before compensation for property has been determined and paid, the court may dismiss the action as to that property after motion and hearing, except that the court may not dismiss the action as to any part of the property of which the plaintiff has taken possession or in which the plaintiff has taken title or a lesser interest, but shall award just compensation for the possession, title or lesser interest taken. . .

Rule 72 (5)f -- Amendment of Pleadings. The plaintiff may amend the complaint without leave of court at any time before trial of the issue of compensation and as many times as desired . . . .

Rule 72(2)(iv) -- a description of the property to be taken sufficient to identify and locate it; that each interest taken, to "each separate piece" of property be specified.

MISCELLANEOUS

Right to earn livelihood -- A property right.

Fraud in consideration -- Misrepresenting something being bought or sold. By benefiting from half of the Bifurcation Agreement, the State purchased developed land at the price of undeveloped land.
Fraud in inducements -- inducing us, in order to compromise our position, to enter an agreement that the state had no intention of honoring.

HOW THE FEDERAL QUESTIONS WERE RAISED IN THE STATE COURTS

NOTE: Besides the Motion to Reconsider, the federal issues were raised in the Complaint to the lower court and in several motions.

Besides raising the federal issues in the appeal to the Alaska Supreme Court, the issues were raised in the more condensed Motion to Reconsider quoted below. In addition, I submitted approximately 15 motions to the Alaska Supreme Court requesting leave to litigate the federal questions in the sister cases. They were all denied.

Lars W. Ehrlander, Pro Se
161 Palace Circle

Alaska 99701
(907) 451-8342
Plaintiff

THE SUPERIOR COURT OF THE STATE OF ALASKA

LARS W. EHRLANDER,)
Plaintiff,)
V.)
STATE OF ALASKA DEPARTMENT OF)
TRANSPORTATION; MR. JOHN)
ATHENS, in his official and)
personal capacity,)
Defendants.)

Superior Court No. 4FA-95-0870 CI

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER DISMISSAL

Owing to space limitations, I will address only the major issues. The Court, on page 16, recognizes that *Res Judicata* does not bar acts postdating the conclusion of the first suit. My claims began after the first trial when the State, in 1988, failed to live up to the stipulation agreement. This case is not about the 1983-84 temporary Borough subdivision denial or the State's influencing the Borough to deny the subdivision in 1983. This is a case where the State entered into a stipulation agreement to bifurcate the appraisal of certain constitutionally protected rights to a trial in 1988. On the day before trial, after a year of preparation, a new judge dismissed the case based on failure to exhaust administrative remedies. We appealed, arguing that there were other issues involved. The Supreme Court reversed and, apparently unaware of the lower court's having limited us to briefing on

the exhaustion issue only, waived Klopping damages, because the theory had not been raised in the lower court. The Supreme Court ruled (without the benefit of all the facts) that it was not clear that the State had attempted to influence the Borough. Therefore, the State was held not responsible on that point. The Supreme Court further ruled that if there had been an early taking based on the Lange test, interest on a value to be determined would be the remedy. The Supreme Court completely overlooked the existence of the stipulation agreement; it was silent on the issue.

The State subsequently argued that the stipulation agreement was no longer valid, because the State had been found not liable for the Borough's acts. Yet, the stipulation agreement was entered into before the first trial, when both the inverse and the formal cases were merged, and most of the bifurcated issues concerned the formal case and had little to do with the Borough. Furthermore, the agreement completely changed the course of the first trial by allowing us to save certain issues for a second trial. Had it not been for the stipulation agreement, the property would have been appraised unimpaired, for its highest and best use, in the first trial. With the cancellation of the second trial, I was deprived of an opportunity to be heard on these constitutionally and statutorily protected issues. The "taking of our business" issue was not known at the time of the first trial nor was "paying a disproportionate

share." These offenses occurred with the abrogation of the stipulation agreement. Neither resulted from "the State's influencing the Borough." Some of the business damages arose from the Borough's action, but those issues also were covered by State statute which forbids appraising property at its impaired value.

Again silent on the stipulation agreement, the Supreme Court subsequently held that the value issues belonged in the first trial and that the remedy in the Lange case was interest only. We asked the Court to reopen the first case, so the property could be appraised in accordance with the law. The Supreme Court, again silent on the stipulation agreement, held that just compensation had been determined by the jury, apparently missing the fact that the jury had not appraised the property that was taken. The Supreme Court did hold that decreases caused by the project should not be considered, but it provided no remedy to correct that violation.

I took over the case Pro Se and asked the Court again to review the issue. This time the Court referred to a statement made by my attorney in an exchange with Judge Blair during the first trial. During this exchange Judge Blair made clear what was bifurcated. My attorney revealed our trial strategy: that we intended to seek full value in the first trial and concentrate on business damages in the second trial, in the form of interest damages on the established value. This was an option

provided by the court. Had the State appraised the property in accordance with the law, as the property was on the date of taking, or had the jury accepted our scenario, that is the strategy we would have adopted. The State instead chose to appraise the four improved city lots as one large unimproved tract and, supposedly, it chose to deal with the business damages in a second trial. This was also an option given by Judge Blair. The Supreme Court interpreted my attorney's statement regarding our trial strategy as a reflection of the stipulation agreement. I have provided several citations by the State on what was bifurcated (Main Brief pg. 40 - 42, id pg. 4), to establish the bifurcated issues; however, identifying them simply requires that one deduct the issues considered in the first trial from the rights that existed before the first trial. (The value of a 6-acre unimproved tract of land and no business damages subtracted from the value of four 1-acre ± subdivided, improved city lots, unimpaired by the highway project, and business damages). The Supreme Court held that my request for review was untimely, and it remained silent on business damages, disproportionate payment for a public project, and highest and best use. The Court has ruled that what the jury evaluated in the first trial (the issues of the first trial) represented just compensation for those issues.

The current 1988 **issues in this case were not known during the 1986 - 87 litigation** of the 1984 taking or were prevented from

being heard because of the narrow structure of the Lange trial. Grant v. State of Alaska 560 P2d 36 AK 1977, and Alsop v. State of Alaska 586 P2d 1236 AK 1978, make it clear that new issues are new causes. Having been told by the Supreme Court that those issues did not belong in the Lange trial is not "being heard on those issues in a meaningful way." We have not only been denied a "fair opportunity for litigation;" there has been no opportunity to litigate these issues. *Res Judicata* does not bar absent **"a fair opportunity to litigate the matter at issue in an earlier suit."**

This case addresses the State's failure to live up to a stipulation agreement to determine the value of constitutionally and statutorily protected rights in a subsequent trial and consequently having triggered constitutional violations of those rights. These rights of just compensation for the highest and best use were not only protected by the stipulation agreement, but also by the federal and state constitutions and statutes [See exhibit A.] [See the main brief]. The settlement of the first trial was contingent upon holding a second trial on the remaining issues. The issues were bifurcated under the direction of the court. The violations of which I am complaining did not materialize until after the first trial, and not until it was clear that we had no venue to have those issues heard. My construction business was taken without any compensation, and my subdivided improved city lots were taken as a

large tract of unimproved land for less than my cost. I do not disagree with the outcome of the first trial. The outcome was a product of the stipulation agreement. That is not the issue here. The current issue is whether the State shall be allowed to renege on the stipulation agreement, violating several constitutional and statutory rights. The Supreme Court, on its own initiative, provided the Lange taking case, offering some relief. However, it did not address the major issues of just compensation for highest and best use, being singled out to pay a disproportionate part of a public project, and taking a business without compensation. Nor did it address whether Constitutional rights can be unintentionally waived. I have provided several citations (See page 40 - 42 in Main brief) where the State admits the true intent of the agreement, and recently, in the sister case appeal, Reply Brief of Appellant, the State again admitted:

Ehrlander's claims for lost profits and damages due to subdivision denial, his claim for interference with the subdivision process, and his claim for the section A taking were all separated from the eminent domain action.

The dismissal of this case was based on several faulty assumptions: 1. That Athens' quotation amounted to a disagreement of law. Mr. Athens stated that no contract existed between the State and the Borough, when in fact such a contract did exist [pg.19]. 2. That my

argument addresses the measure of damages for past litigation. It concerns the bifurcated issues which the State identified above [pg.16]. 3. That this is a new theory regarding previously litigated issues [pg15]. The issues raised here could not possibly have been raised before they were known. 4. That no material fact issues exist. At the very least, material fact issues exist on what was bifurcated from the first trial -- whether we carried a disproportionate burden of this public project and whether the State took my business. There are also factual questions as to whether the State acted fraudulently, in which case *Res Judicata* would be waived. Viewed in the light most favorable to the nonmoving party and where reasonable men could differ, these issues should be determined by a jury. 5. That the Tinker Affidavit was the only misstatement of fact. The State made numerous misstatements of fact [Main brief pg. 20-25] The intentional misrepresentation of the legal description of the property taken was particularly egregious. The State's most injuriously fraudulent *act* was to enter into the stipulation agreement with no intent to honor it. 6. That no federal violations occurred. Federal violations consist of taking property rights without Due Process or Just Compensation and doing so by committing fraud. Additional federal violations were making one individual carry a disproportionate burden of a public project and making the property owner much poorer following an Eminent Domain Taking.

My oldest son is now attending the Naval Academy. He has taken an oath to uphold the Constitution with his life. I hope our Constitution stands for something.

ENTERED this 26th day of December, 1995

By: Lars W. Ehrlander, Pro Se

_____

Lars W. Ehrlander, Pro Se
161 Palace Circle
Fairbanks, Alaska 99701
(907) 451-8342
Plaintiff

THE SUPREME COURT FOR THE STATE OF ALASKA

LARS EHRLANDER,)
Plaintiff,)
V.)
STATE OF ALASKA D.O.T.,)
Defendant.)
_____)

Supreme Court No. S-7535
Trial Court No. 4FA-95-0870 Civil

MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER AND FOR REHEARING

I ask the Court to reconsider its March 12, 1997 ruling as it violates both the state and federal constitutions and **virtually every** condemnation statute and regulation, both state and federal. [See appeal brief]

1. The ruling condones the Attorney General's practice of fraudulently taking private property absent compensation or due process by engaging in a **fraudulent** Bifurcation Agreement. It is among other

infractions, a violation of the federal Fifth and Fourteenth Amendments.

2. The ruling condones, "based on lack of evidence", a judge's not disclosing a conflict of interest, even though the judge made an effort to conceal evidence, including prohibiting discovery and inspection of the non privileged public record. This judge was a likely witness in the case and dismissed the case to avoid this conflict. **It is for a jury to determine the facts** of the charge. This lack of fair process is among other wrongs, a violation of the federal Seventh and Fourteenth Amendments.

3. The ruling denies a forum to hear civil rights violations and thereby obstructs federal justice.

4. The ruling inappropriately provides for Rule 82 costs and fees **on all costs and fees** even though 95% of the issues involved eminent domain issues that are governed by Rule 72, which does not provide for state litigation costs.

We were denied litigation costs on appeal after having prevailed in the sister case on the "Lange taking".

5. This ruling provides that **even post trial issues**, no matter how irrelevant to previously tried issues, are *res judicata* to future litigation. Based on this ruling the State can from now on take additional property from our subdivision without compensation, because the adjacent

property has once been subject to a state taking. **I must emphasize that my claim for the State's taking the access road in 1990 did not involve <u>the same</u> property,** nor did the State's taking our business and improvements. Even if the Court should find some issues to be *res judicata*, it should not dismiss post trial issues. This is a violation of the federal Fifth and Fourteenth Amendments.

If the above noted results of the ruling were intended, then at least this Court's unique disposal of the issues is consistent. If not, I ask the Court for a rehearing on the applicable issues.

Signed in Fairbanks, Alaska this March 21, 1997.

Lars W. Ehrlander, pro se

EVIDENCE OF IMPAIRMENTS RESULTING FROM THE HIGHWAY PROJECT

Case 4FA-86-886 CI

October 5, 1987

JUDGE BLAIR'S OPINION AT HEARING:

On Motion for Partial Summary Judgment and Opposition to Motion to Dismiss.

beginning on page 17:

MR. ANDREWS: At the time Mr. Ehrlander applied, in fact the State statute said that selling lots in a subdivision without prior approval was a misdemeanor in fact. I think that's been taking out, but.....

THE COURT: Well, why did they turn down the subdivision in this case?

MR. ANDREWS: The Borough has to concede it was turned down because of the Geist Road Extension going through. The record shows that. We were.....

THE COURT: So that's really the key, isn't it, the argument that there could have been other reasons for turning down the subdivision, so what? That isn't the reason it was turned down.

And on page 28 State attorney Mr. John Athens admits:

MR. ATHENS: It would have cost the State more,...

ACQUISITION SERVICES, INC.

Mr. Gary Vancil, Attorney December 3, 1987
P. O. Box 75373
Fairbanks, AK 99707

Re: Appraisal of Parcel 20-A [Ehrlander)
Project No. RS-RRS-M-OOOSIS2)
Geist Road Extension: Peger to College

. . . the subject property bas been appraised as a vacant and unimproved acreage tract with a highest and best use for residential development. It has not been appraised as a subdivided parcel, . . .

CHANGE TO CONDITIONS AND SERVICES:

Mr. Hoagland, state appraiser April 13, 1988.

This Amendment is necessary to provide a concise written report on parcel 20A to establish the following facts: (1) The date of taking the court alleges took place prior to the State's date of taking on said parcel; (2) To determine whether any business losses occurred as alleged by

inverse proceedings; (3) To provide engineering costs; (4) To determine compensation, if any. (5) To determine if any diminution of value to property took place as a result of taking; and (6) To establish damages, if any. . . .

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander , plaintiff,
v.
State of Alaska and Public Facilities, Defendants.

Case No. 4FA-86-2287 Civil

AFFIDAVIT OF GLENN POTTS, State appraiser

Glenn Potts, being first duly sworn, deposes, and says:

1. He has knowledge of the facts herein.

2. I was employed by the State of Alaska as a real estate appraiser in 1983 and 1984. In this capacity, I was asked by the State in late 1983 or early 1984 to establish the fair market value of an area of Lars Ehrlander's property south of the proposed Geist Road Extension which the State was contemplating selling to Golden Valley Electric Association after the State acquired the property from Mr. Ehrlander.

3. After thoroughly examining the area and the pertinent market, I estimated that the fair market value of the property was $4.50 per square foot, as set forth in Exhibit 1 to this affidavit.

4. Property such as that which Lars Ehrlander sought to subdivide for residential purposes in 1983 and 1984, but could not due to the pendency, of the State's Geist Road Extension (now the Johansen Expressway), is particularly vulnerable to substantially impaired marketability due to pending acquisition by the State since families and other with long term housing needs rarely, if ever, desire to purchase, lease, rent, or otherwise obtain an interest in property when that interest may be destroyed in a forthcoming condemnation, necessitating those persons to incur the hardships attendant in moving and obtaining other property to satisfy their housing needs.

5. The Alaska Statutes, AS 34.60.120(3) (Exhibit 4), requires that for just compensation purposes property be appraised without including any decrease in value due the pendency of the project for which it is eventually acquired. The State of Alaska's appraisal by Gary Hoagland which the State utilized in the formal condemnation case, 4FA-86-886 Civil, however, failed to exclude the decrease in value .to Lars Ehrlander's property resulting from the pendency of the Geist Road Extension, but instead specifically included the decreased, depressed value in its determination of just compensation. This fundamental error in Mr. Hoagland's appraisal is evident on its very face as indicated in the cover letter to the appraisal, a copy of which is attached as Exhibit 2 to this affidavit. Only by virtue

of the Stipulation and Order (Exhibit 3) reserving for the above-captioned case the damages to Mr. Ehrlander's property due to the pendency of the State's Geist Road Extension, could the prejudicial effects of Mr. Hoagland's appraisal and testimony be cured.

FURTHER AFFIANT SAYET NAUGHT.

Sworn on December 11, 1991 Glen Potts, Affiant

Value of Ehrlander's Property - Estimate (by Glen Potts)

It is estimated that the Right of Way (ROW) will encompass 3.8± acres or 165,000 sq. ft. and an uneconomic remainder of 3.5± acres or 152,460 sq. ft. will lie between the road and railroad. Due to actions initiated by the Borough without the Department of Transportation's (DOT & PF) concurrence, this Ehrlander property of 23.3± acres was only Partially subdivided. It is assumed that the property must be appraised as though totally subdivided and DOT & Pf. were purchasing individual lots on the basis of $4.50 per sq. ft. Prior to deriving a value for the areas needed for the project, net subdivision lot areas must be calculated and development cost not incurred to date must be subtracted from the gross square foot lot cost. After all these factors are considered, it is my opinion that the value of the ROW is $330,000. and the damaged uneconomic remainder is $290,000 for a total of $620,000.

The potential value of the uneconomic remnant in assemblage to the Golden Valley Electric Association (GVEA) holdings with an industrial use is estimated to be $1.00/sq. ft. or $152,460. the degree of need that GVEA might have for this parcel is unknown. They have indicated a desire to purchase at a bargain price. I will assume that a price of 50 cent on the dollar would be a sufficient amount to entice GVEA to purchase. Therefore, the value of the remainder is $75,000(R.).

Signed Glenn Potts

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

Lars Ehrlander , plaintiff,
v.
State of Alaska and Public Facilities, Defendants.

Case No. 4FA-86-2287 Civil

AFFIDAVIT OF KARL SOPP

Karl Sopp, being first duly sworn, deposes, and says:

1. He has knowledge of the facts herein.

2. I have been a professional real estate appraiser in the Fairbanks area for the last eighteen (18) years.

3. I am an appraiser who has obtained a MAI designation.

4. I am familiar with that property owned by Lars Ehrlander, which property was formally condemned by the State of Alaska for its

Geist Road Extension in a condemnation action commenced April 29, 1986, Case No. 4FA-86-886 Civil. I am likewise familiar with Lars Ehrlander's efforts to subdivide said property in 1983 and 1984, and that said subdivision was. denied due to the pendency of the State's Geist Road Extension.

5. In 1983, as indicated in Exhibit 1 to this Affidavit, Title 17 of the Fairbanks North Star Borough Code of Ordinances prohibited Lars Ehrlander from selling land which was subject to be subdivided but which was not yet subdivided.

6. It is a well-established fact that property, such as that which the State of Alaska formally took from Mr. Ehrlander in 1986 which is suitable for subdivision or other development but which is subject to the threat or other distinct possibility of pending Condemnation is substantially impaired in marketability and correspondingly decreases in value. This is demonstrated further by the severely-impaired value Lars Ehrlander received for his property in the former condemnation case, 4FA-86-886 Civil, $1.79 per square foot as compared to the finished lots up to $4.95 per square foot which Lars Ehrlander was receiving for his adjacent property which was not blighted by the pendency of the Geist Road Extension. Lars Ehrlander's property was therefore not able to be appraised to its highest and best use as

subdivided residential lots, similar to the adjacent parcel where lots were selling as high as $4.95 a square foot.

7. As a matter of law (Exhibit 2) and a point of proper appraisal practice, decreases in a property's value due to the pendency of the project for which it is eventually acquired are not be considered in appraising and otherwise valuing the property for just compensation purposes.

8. I am familiar with the appraisal of the State's appraiser Gary Hoagland and with the jury's verdict based thereon. Mr. Hoagland's appraisal and the corresponding jury verdict failed to exclude those decreases in the value of Lars Ehrlander's property which occurred from August of 1983 through April 29, 1986 as a result of the pendency of the State's Geist Road Extension. The State's case and the evidence presented appears not to acknowledge that the pendency of the Geist Road Extension was the only reason that prevented Mr. Ehrlander from subdividing and developing the land to its highest and best use The threat of condemnation prevented the Borough from approving the plat. Accordingly, at the formal condemnation trial, Lars Ehrlander did not receive the fair market value for his property but received a value as if the property were not improved to its highest and best use as a residential subdivision, but rather as unimproved parcel depressed by the effects of the pending Geist Road Extension. It thus

also appears that the State did not compensate Lars Ehrlander for the loss of profit potential and the additional costs associated with the portion of the subdivision that was not completed due to the pendency of the Geist Road Extension. See Exhibit 3.

FURTHER AFFIANT SAYETH NAUGHT.

Sworn by Karl Sopp, affiant on December 11, 1991

EVIDENCE OF THE PROPERTY BEING IMPROVED

CITY OF FAIRBANKS

February 5, 1987

Subject: Royal Court Village

Dear Mr. Ehrlander:

In response to your recent inquiry, sewer and water connection charges were calculated on the basis of the City providing water for distribution and sewer treatment service to the property as shown on the attached preliminary plat for Royal Court Village. The charges were specified in the annexation ordinance (see attached Ordinance No. 4265, adopted September 12, 1983) and payment was received in the full amount of $44,137.22 on July 5, 1984. The sewer and water system constructed has the capability of providing sewer and water service to the entire subdivision as shown on the preliminary plat.

Sincerely, J, C. Phillips, City Engineer

"The Golden Heart City"

EVIDENCE OF ISSUES BIFURCATED

STATE'S AMENDED APPRAISAL INSTRUCTIONS

7-31-89

Change to condition of services:

This Amendment is necessary to provide a concise written report on Parcel 20A to establish the following facts: (1) The date of taking the court alleges took place prior to the State's date of taking on said parcel; (2) To determine whether any business losses occurred as alleged by inverse proceedings; (3) To provide engineering costs; (4) To determine compensation, if any; (5) To determine if any diminution of value to property took place as a result of taking; and (6) To establish damages, if any. . . .

Dated July 31, 1989

See the Bifurcation Order page A.41

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
FOURTH JUDICIAL DISTRICT

LARS EHRLANDER,
Plaintiff,
v.
STATE OF ALASKA, DEPARTMENT
OF TRANSPORTATION AND PUBLIC FACILITIES,
Defendants.

Case No. 4FA-86-2287 Civil
Case No. 4FA-86-886 Civil

RESERVATION OF FEDERAL CLAIMS AND ISSUES FOR FEDERAL COURT

COMES NOW Lars Ehrlander, by and through his counsel Robert John the Law Offices of William R. Satterberg, Jr., and hereby notifies this Court that he intends to pursue any federal constitutional or statutory claims in federal court following the conclusion of State court proceedings in this matter. Accordingly, to the extent that Lars Ehrlander's federal law claims and issues have not been previously addressed and determined in this matter and may otherwise be pursued against the State and others in federal court following the conclusion of proceedings in this matter, Lars Ehrlander reserves such claims and issues for determination in federal district court following the conclusion of this case. Correspondingly, Lars Ehrlander reserves the right to petition to the United States Supreme Court for a writ of certiorari in this case concerning those federal claims and

issues which are not reserved for federal court following the conclusion of this case.

While Lars Ehrlander may refer to decisions of the United States Supreme Court and other courts concerning federal constitutional and statutory claims and issues, any such references have not been intended to and are not intended to constitute the litigating of a federal claim or issue. Rather, such references to decisions of the United States Supreme Court and other courts concerning federal claims and issues are made solely for their persuasive authority.

DATED this 7th day of August, 1992, at Fairbanks, Alaska.

THE LAW OFFICE OF WILLIAM R. SATTERBERG, JR.

BY Robert John
Attorney for Lars Ehrlander